

The Honorable John Kline, Chairman  
The Honorable Phil Roe, M.D., Chairman  
January 20, 2012  
Page 2

While Board Members may, from time to time, speak about the deliberative process generally, it is a long-standing tradition that they do not publically reveal the deliberations on any particular case. Whether Republican, Democrat, or Independent, Board Members have adhered to these principles because they recognize that the Board can function effectively only in an environment where the free flow of ideas is not compromised by the fear of public disclosure of private communications.

The Board remains willing to work with the Committee to accommodate its legitimate oversight needs. In that regard, please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-1700, to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read 'William B. Cowen', with a stylized flourish at the end.

William B. Cowen  
Solicitor

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

November 29, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

I write in response to your November 18, 2011 letter to Chairman Mark Gaston Pearce requesting further information on the National Labor Relations Board's proposed regulation concerning amendments to the Board's representation case procedures (the "R-Case Procedures Rulemaking"), which was published in the Federal Register on June 22, 2011. 76 Fed. Reg. 36812.

Your additional inquiries appear to be based in substantial part on comments made by Member Brian E. Hayes in his letter to you dated November 18, 2011. By letter to Member Hayes dated November 21, 2011, Chairman Pearce responded in detail to the comments made by Member Hayes. You were copied on Chairman Pearce's letter, and I have attached an additional copy as Exhibit 1 for your convenience. That letter addresses many of the issues raised in your November 18 letter.

I have also enclosed the following materials in further response to your request:

- A chart providing further information on the staff who were or are currently working on the final rule for the R-Case Procedures Rulemaking (Exhibit 2). Most staff on this list spent only a small amount of time working on the project. Less than 10% have averaged more than 20 hours per week. The chart does not include staff whose sole role was (1) assisting with the logistics of the two day public meeting held by the Board in July 2011, or (2) clerical work connected with the processing of public comments.
- A copy of Executive Secretary Memorandum No. 01-01 (Exhibit 3). We are not aware of any documents or communications regarding the applicability of this E.S. Memo to rulemaking, other than Member Hayes' letter to you and Chairman Pearce's letter to Member Hayes.

Finally, your letter inquires about what you refer to as "'emergency' revisions of the ordinary internal rules" for case processing. Please be advised that no such procedures have been adopted by the Board. It is not unusual, however, for the Board to utilize expedited case processing procedures in anticipation of the end of a fiscal year or the end of a Board Member's term. These procedures are adapted to the circumstances of the prompting event (fiscal year or end-of-term) and the Board's general case processing objectives. Over the years, each Board has utilized expedited procedures that it finds suitable.

It is my understanding that Member Becker has proposed such procedures in anticipation of the end of his term when Congress adjourns sine die, and that these are the procedures to which your inquiry refers. I have attached as Exhibit 4 a copy of the proposal that Member Becker made on this topic to Member Hayes, which is mentioned in Chairman Pearce's November 21 letter. While this proposal may have some elements that are not found in other expedited procedures used in recent years, it is typical for the Board to consider adopting special end-of-term case processing procedures.

If you have any further questions or need further assistance, please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-1700. We will be happy to meet with you to discuss how we might accommodate any further information needs you may have.

Sincerely,



William B. Cowen  
Solicitor

Enclosures

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce



UNITED STATES GOVERNMENT

**NATIONAL LABOR RELATIONS BOARD**

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

November 10, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

I write in response to your October 27, 2011, letter to National Labor Relations Board Chairman Mark G. Pearce, requesting information on the Board's proposed regulation concerning amendments to its representation case procedures (the "R-Case Procedures Rulemaking"), which was published in the Federal Register on June 22, 2011. 76 Fed. Reg. 36812.

**History of Board Rulemaking Procedures**

As you know, during its 76-year history, the NLRB has administered and interpreted the National Labor Relations Act ("NLRA") primarily through adjudication. When rulemaking has been undertaken, the process followed has varied depending on the nature and subject of the rulemaking. The Board follows the Administrative Procedure Act ("APA"), 5 U.S.C. sec. 551 et seq., and has sometimes engaged in notice-and-comment rulemaking pursuant to that statute.

Neither the National Labor Relations Act nor the Board's own Rules and Regulations and Statements of Procedure establish any procedures or timetables for rulemaking by the Board. It is conceivable that the Board may have adopted such procedures and timetables on an ad hoc basis for particular rulemakings at some point during its history, but we have not been able to identify such an instance.

The Board, established in 1935, has issued rules since before the APA was enacted in 1946. The primary subjects of the Board's rules have been the procedures to be followed in unfair labor practice cases and in representation cases under the NLRA. Other rules establish certain jurisdictional standards or implement statutes that apply to the Board, such as the Freedom of Information Act and the Equal Access to Justice Act. In their current form, denominated "Series 8" (and preceded by Series 1-7), the Board's Rules and Regulations and Statements of Procedure can be traced to a



Federal Register publication date of November 4, 1959. 24 Fed. Reg. 9095. These rules have been amended many times since then.

One of the most notable and complicated notice-and-comment rulemaking initiatives by the Board was the adoption of a rule addressing appropriate bargaining units in the health care industry (Sec. 103.30). The Board published an initial notice of proposed rulemaking ("NPRM") on July 2, 1987, with Chairman Dotson and Member Johansen dissenting. 52 Fed. Reg. 25142. Four public hearings followed. The Board also met in open session to discuss the subject of the rulemaking. A second NPRM then was published on September 1, 1988, with Member Johansen dissenting. 53 Fed. Reg. 33900. A final rule was published on April 21, 1989, with Member Johansen dissenting. 54 Fed. Reg. 16336. We have been unable to determine whether, in connection with the Health Care Rulemaking, the Board adopted any internal operating procedures addressing the process or timetable by which public comments were to be considered; a final rule was to be drafted, circulated, and voted upon; and dissenting opinions (if any) were to be prepared.

Member dissents from rulemaking by the Board seem to be rare. In addition to the dissent from the Health Care Rule, we have identified two dissents from final rules:

In 1972, the Board issued a final rule (Sec. 103.3) declining to assert jurisdiction over the horseracing and dog racing industries; Member Fanning dissented briefly, citing his dissent in an earlier Board decision on the issue. 38 Fed. Reg. 9537.

Earlier this year, Member Hayes dissented from the Board's final rule requiring employers to post a notice of employee rights under the NLRA (the "Notice Posting Rulemaking"). 76 Fed. Reg. 54006 (Aug. 30, 2011).

Since at least the early 1960s, a Rules Revision Committee ("Revision Committee") consisting of high-level career officials has met from time to time to review existing procedural rules and regulations and propose revisions or modifications if needed. That committee currently consists of the following members:

- Assistant General Counsel, Legal Research & Policy Planning Branch
- Associate General Counsel, Division of Operations-Management
- Chief Administrative Law Judge
- Deputy General Counsel
- Executive Secretary
- Inspector General
- Solicitor
- Director, Office of Representation Appeals

Proposed regulations, however, have not always gone through or originated with the Revision Committee. For example, as described above, the Revision Committee

did not participate in producing the rule addressing appropriate bargaining units in the health care industry. Likewise, the Revision Committee did not initiate a recent effort to review NLRB rules related to filing and service, among other matters. Instead, a committee comprised of field and headquarters personnel undertook that review. The committee's recommendations involve eliminating requirements to file multiple copies and outdated references, as well as pursuing revisions in light of technological advances. They also involve codifying existing practices with respect to the filing of amicus briefs and replies to oppositions to motions, and the settlement of cases through the Board's alternative dispute resolution program. This committee has also suggested modifications to the rule that requires a charging party to notify other parties of its decision to appeal the dismissal of an unfair labor practice charge.

Prior to the R-Case Procedures Rulemaking, the Board's most recent rulemaking was the Notice Posting Rulemaking, proposed on December 22, 2010, and made final on August 30, 2011. 76 Fed. Reg. 54006. The Board followed the procedures of the APA, including soliciting public comments, in promulgating this rule.

The most recent printed compilation of the Board's Rules and Regulations and Statements of Procedure dates from 2002, and we have attached as Exhibit 1 a table from that compilation that lists all of the amendments to the rules between 1959 and 2002. In addition, for your information, we have prepared and attached as Exhibit 2 a table that lists 11 amendments that were published in the Federal Register between 2002 and the present. A complete and current set of the Rules and Regulations and Statements of Procedure is available on the NLRB website at: <http://www.nlr.gov/publications/rules-regulations>.

### **R-Case Procedures Rulemaking**

As you know, the public comment period for the R-Case Procedures Rulemaking closed on September 6, 2011. The NLRB staff involved in the preparation of the final rule work in several offices. On the Board side, there are staff from the offices of Board members, the Office of the Executive Secretary, the Solicitor, the Office of Representation Appeals, and the Office of the Chief Information Officer. From the General Counsel side, staff from the Special Litigation Branch of the Division of Enforcement Litigation and staff from several regional offices have assisted. These staff have been organizing, coding, reviewing, and analyzing the extensive public comments received as well as performing legal research on topics related to the rulemaking and preparing portions of a draft final rule to be presented to the Board members. Staff have not been transferred or reassigned to work on this project. They continue to carry out the duties they are assigned in their respective offices.

We are aware of no limitation, statutory or otherwise, on the allocation of staff by the Board or the Acting General Counsel to work on the R-Case Procedures Rulemaking. In unfair labor practice cases, of course, a strict division between the

office of the General Counsel and the Board is maintained, and staff who have been detailed from one office to the other cannot work on a case they handled during that detail when they return to their original office. Work on the R-Case Procedures Rulemaking does not implicate any conflict of interest concerns.

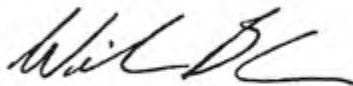
As is the case with any matter before it, the Board will seek to ensure that every Member will have adequate time to review a draft of the final rule and decide whether to approve it, propose modifications, or offer a dissent. Discussions between Board Members on how to complete the R-Case Procedures Rulemaking are ongoing and no specific timetable has been established at this time. The following is a timeline of past and anticipated actions on the rulemaking:

|                    |                                                                           |
|--------------------|---------------------------------------------------------------------------|
| June 22, 2011 –    | Publication of proposed rule.                                             |
| July 18-19, 2011 – | Public meeting on proposed rule. 66 witnesses testified before the Board. |
| Aug. 22, 2011 –    | Deadline for filing initial public comments.                              |
| Sept. 6, 2011 –    | Deadline for filing reply comments.                                       |
| Unknown –          | Board vote on how to proceed on final rule.                               |
| Unknown –          | Draft of final rule circulated to Board Members.                          |
| Unknown –          | Publication of final rule in Federal Register.                            |

In response to your request for information on the number of decisions issued by the Board, attached as Exhibit 3 is a chart showing a monthly breakdown of all decisions issued by the Board from October 2009 through October 2011. In addition, for your information we have attached as Exhibit 4 a chart showing the monthly breakdown of what are referred to as "contested decisions" for the same period.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.<sup>1</sup>

Sincerely,



William B. Cowen  
Solicitor

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce

---

<sup>1</sup> Member Brian Hayes has indicated that he has not had sufficient time to review and consider this letter and he reserves the right to comment separately.



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

November 1, 2011

The Honorable John Kline  
Chairman, Education and the Workforce Committee  
The Honorable Phil Roe, M.D.  
Chairman, Subcommittee on Health, Employment,  
Labor, and Pensions  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

I write in response to your letter dated October 14, 2011, to National Labor Relations Board Chairman Mark Gaston Pearce, regarding the Board's recent decision in *Lamons Gasket Company*, 357 NLRB No. 72 (2011). Your letter expresses concerns regarding both substantive and procedural aspects of the *Lamons* decision, and requests certain information regarding related cases.

I will not comment further regarding the substance of the *Lamons* decision, as the Board has expressed itself through the majority and dissenting opinions in that case. With regard to your procedural concerns regarding the retroactive application of that decision, the Board's traditional practice has been to apply changes in representation law to the case under current consideration and to other pending cases in whatever stage.<sup>1</sup> One early example of this practice is the Board's 1962 decision in *General Cable Corporation*, 139 NLRB 1123 (1962).

In *General Cable*, the regional director issued a decision and direction of election. The parties filed requests for review, asking the Board to reconsider its "contract bar" policy with respect to the length of time that a labor agreement would act as a bar to a representation petition. Prior to that case, the Board policy was that a labor agreement would bar a representation petition for the first two years of the agreement. In *General Cable*, the Board granted review in three cases to reconsider the issue. The Board decided to enlarge "contract bar"

---

<sup>1</sup> Member Hayes dissented in *Lamons*, and would accordingly oppose its application to any pending petition that would have been processed under prior representation law in *Dana Corp.*, 351 NLRB 434 (2007).





UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

August 1, 2011

The Honorable John Kline  
Chairman, Education and the Workforce Committee  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

I write in response to your letter dated July 18, 2011, to National Labor Relations Board Chairman Wilma Liebman, regarding the Agency's response to your March 3, 2011 letter seeking information related to Chairman Liebman's February 18, 2011 joint statement with Acting General Counsel Lafe Solomon on the potential impact of a proposed cut of \$50 million to the NLRB's budget.

As you know, by letter dated March 17, 2011, we responded to your March 3 oversight request and provided a significant amount of information regarding the NLRB budget process and the projections of our budget office that formed the basis for the joint statement. Thereafter, on March 24, the Agency's budget officer gave a briefing to Committee staff, answering questions about the materials provided with the March 17 response and providing additional information. On April 7, Agency staff provided a substantial amount of additional, detailed information regarding the Agency's budget in response to questions that arose during the March 24 briefing.

Agency staff and Committee staff met again on April 18, to further discuss the Committee's March 3 budget statement oversight request and a separate oversight request concerning the *Specialty Healthcare* case. One of the issues discussed at the meeting was the Committee's request for copies of communications with the Office of Management and Budget ("OMB"), regarding the joint statement. Agency staff indicated that they would need to obtain OMB's consent to release those communications. At the conclusion of that meeting, Committee staff indicated they would memorialize the conversation in a forthcoming email or letter.

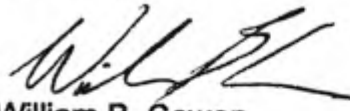
The first written communication from the Committee following the April 18 meeting concerning the matters discussed in that meeting was a second

The Honorable John Kline  
August 1, 2011  
Page 3 of 3

Enclosed are documents in response to your request. We trust that the information provided in this letter is sufficient to address any concerns you may have about our responses to the Committee's March 3 oversight request and *The Hill's* FOIA request. Your letter also seeks copies of the Agency's internal communications regarding those requests. Seeking such communications implicates substantial Executive Branch confidentiality interests beyond those that we have already discussed with the Committee. It is longstanding Executive Branch practice generally not to disclose to Congress internal communications that were made after the completion of the matter that is subject of the congressional inquiry, as an agency prepared its response to that inquiry. It is important to preserve the ability of agency officials and staff to communicate confidentially as they discuss how to respond to oversight and other inquiries from Congress. We are concerned that disclosure of such communications would effectively chill, if not halt such deliberations, which could substantially impede the Agency's ability to respond to congressional oversight requests. That result would be detrimental to the operations of both Branches.

As always, we will be happy to meet with you to discuss how we might accommodate any further information needs you may have. Please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-1700 if you would like to set up such a meeting or have further questions.

Sincerely,



William B. Cowen  
Solicitor

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce





UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

May 25, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Re: *Specialty Healthcare and Rehabilitation Center of Mobile*  
Case 15-RC-8773

Dear Chairman Kline:

I write in response to your May 11, 2011, letter concerning the Committee's request for documents and communications related to *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers, District 9*, Case 15-RC-8773.

The National Labor Relations Board (NLRB or Board) has previously supplied the Committee with all relevant public documents concerning this open representation case, now pending before the Members of the Board. The Committee's latest letter makes clear that the Committee is seeking non-public documents that would reveal, in great detail, the Board's on-going deliberations about the case, before a decision is issued. Such a request is highly unusual and intrusive. It is based entirely on the concern that the Board might, in the end, issue a decision in *Specialty Healthcare* that should have been made through the process of notice-and-comment rulemaking. That concern is speculative, because there has yet been no decision. Moreover, the Supreme Court has consistently upheld the Board's power to decide statutory issues, such as whether bargaining units are appropriate, on a case by case basis through adjudication. Finally, the question of when an administrative agency must act through rulemaking is a question of law turning on the effect of the agency's action. Internal, deliberative documents are in no way relevant to that question.

After careful consideration, a Board majority has concluded that disclosing the deliberative documents sought by the Committee would jeopardize the Board's ability to decide the case fairly and independently, as well as prejudicing the due process rights of the parties to the case. While the Board remains willing to work with the Committee to satisfy its legitimate oversight responsibilities, for the reasons explained more fully

below, the Board respectfully declines at this time to produce pre-decisional, deliberative communications and documents related to this pending case.<sup>1</sup>

### ***Specialty Healthcare* Procedural History**

*Specialty Healthcare* is a case pending before the Board, under deliberation, and pending a decision. On December 18, 2008, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the Union) filed a petition with Region 15 of the Board. That petition sought the certification of a bargaining unit comprised exclusively of 53 Certified Nursing Assistants (CNAs) employed by a nursing home (a non-acute care facility). At a hearing conducted on December 30, 2008, in Region 15, *Specialty Healthcare* and Rehabilitation Center of Mobile (Employer) contended that the only legally appropriate unit consisted of 86 employees including CNAs, Activity Assistants, Dietary Aides, Cooks, Central Supply Clerk, Staffing Coordinator, Medical Records Clerk, Maintenance Assistant, Social Services Assistant, Business Office Clerk, and Receptionist. The Regional Director in Region 15 (RD) found that a unit comprised only of CNAs was appropriate.

On February 19, 2009, the Board granted the Employer's Request for Review of the decision of the RD. On December 22, 2010, the Board invited parties and amici to file briefs addressing the issues raised in the case.<sup>2</sup> The Board explained that its final rule regarding appropriate bargaining units in the health care industry, Rule 103.30(g), excluded nursing homes from coverage and instead provided that appropriate bargaining units in nursing homes would be determined "by adjudication." The current standard for making such determinations was adopted in an adjudicated case, *Park Manor Care Center*,<sup>3</sup> which envisioned that over time the Board would be able to determine which units are "typically appropriate" in nursing homes.<sup>4</sup> In inviting briefs in *Specialty Healthcare*, the Board observed:

[T]he Board continues to believe that it is its obligation under the [National Labor Relations] Act to continually evaluate whether its decisions and rules are serving their statutory purposes. This is particularly true of decisions such as *Park Manor*, where the Board adopted a new approach to determining whether units are appropriate in health care facilities not covered by its newly-promulgated rule, but extends as well to the procedures and standards for determining whether proposed units are appropriate

---

<sup>1</sup> Board Member Hayes did not agree with the position taken by his colleagues. However, he agrees that he is institutionally bound to adhere to this position.

<sup>2</sup> *Specialty Healthcare and Rehabilitation Center of Mobile and United Steelworkers*, District 9, Case 15-RC-8773, Notice and Invitation to File Briefs, 356 NLRB No. 56 (December 22, 2010).

<sup>3</sup> 305 NLRB 872 (1991).

<sup>4</sup> *Id.* at 875.

in all industries – a critical and necessary prerequisite for resolving questions concerning representation.<sup>5</sup>

The Board further observed that it “strongly believe[d] that asking all interested parties to provide [the Board] with information and argument concerning the question of statutory construction raised in this case is the fairest and soundest method of deciding whether our rules should remain the same or be changed and, if the latter, what the new rules should be.”<sup>6</sup>

The Board also addressed the issue, raised by the dissent, of whether it was appropriate for the Board to proceed through adjudication, rather than rulemaking. It pointed out that with the sole exception of the health care rule, the Board – for more than 75 years and with the Supreme Court’s approval – has exclusively used adjudication to address a wide range of statutory issues, including what bargaining units are appropriate under the Act. The Board observed that adjudication is subject to judicial review and allows for broad participation by interested parties through the submission of amicus briefs. It nevertheless observed, “[I]f, at any time, we are convinced that rulemaking would be a fairer or otherwise more appropriate means to address the questions raised in this case, we shall initiate that process.”<sup>7</sup>

Specifically, the Board invited parties and amici to address the following questions: 1) What has been your experience applying the “pragmatic or empirical community of interests approach” of *Park Manor Care Center*, 305 NLRB 872 (1991) and subsequent cases; 2) What factual patterns have emerged in the various types of nonacute health care facilities that illustrate what units are typically appropriate; 3) In what way has the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities; 4) How should the rules for appropriate units in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities; 5) Would the proposed unit of CNAs be appropriate under *Park Manor*; 6) If such a unit is not appropriate under *Park Manor*, should the Board reconsider the test set forth in *Park Manor*; 7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute healthcare facilities. Should such a unit be presumptively appropriate as a general matter; 8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are “readily identifiable as a group whose similarity of function and skills create a community of interest.”<sup>8</sup>

---

<sup>5</sup> 356 NLRB No. 56, slip op. at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 1-2.

The Board set February 22, 2011, as the deadline for parties and amici to submit briefs and later extended that deadline to March 8, 2011.<sup>9</sup> On March 8, you and Congressman Issa, and three United States Senators filed and served on the parties to this case separate requests that the Board delay the deadline for filing briefs by 60 days. On March 17, 2011, the Board granted those requests in part and allowed those parties and amici who *previously* filed briefs by March 8, 2008, as well as you and Congressman Issa, to file briefs addressing information made public at your request by March 29, 2011.<sup>10</sup>

The deadline for filing all briefs has passed and this case is now under consideration by the Members of the Board and pending a decision.

### **History of the Committee's Oversight Requests**

On March 7, 2011, you sent to the Board an oversight request regarding *Specialty Healthcare*.<sup>11</sup> First, the request asked the Board to make public on its website a list of all Certification of Representative cases (RC cases) filed from 2000 to 2011 identifying cases that involved certain issues and aspects of each of those cases, all hearing records from RC cases in which a hearing was held between 2000 and 2011 that involved certain issues, and all documents from all RC cases from 2000 to 2011 in which the petition was dismissed on the grounds that the "proposed unit was too narrow." Second, the request asked that the Board delay the deadline for filing amicus briefs in *Specialty Healthcare* by 60 days from the date the Board made public on its website the data requested.<sup>12</sup> Finally, the March 7 request sought "all documents and communications referring or relating to" *Specialty Healthcare*, "all documents and communications referring to or relating to" the Board's invitation to file briefs, and all "documents and communications referring or relating to estimates of the financial effects of any change to the determination of an appropriate bargaining unit under the National Labor Relations Act" no later than March 21, 2011.

On March 17, 2011, Lester A. Heltzer, Executive Secretary for the Board, responded in part to the March 7, 2011 oversight request.<sup>13</sup> Mr. Heltzer stated that on March 15, 2011, the Board had made available on its website data derived from its database that is responsive to the request. On March 17, Mr. Heltzer also provided, as

---

<sup>9</sup> February 7, 2011, Order Granting Extension of Time to file Briefs.

<sup>10</sup> Order Modifying Briefing schedule and Granting Extension of Time to File Supplemental Briefs, issued March 17, 2011.

<sup>11</sup> Letter from John Kline and Darrell Issa, U.S. Congressmen, to Wilma Liebman, Chairman National Labor Relations Board (Kline and Issa Letter to Liebman) (March 8, 2011).

<sup>12</sup> On March 8, 2011, the deadline for filing amicus briefs in the case at the time, the oversight request was filed as a motion requesting an extension of time and served on the parties in the case.

<sup>13</sup> Letter from Lester A. Heltzer, Executive Secretary National Labor Relations Board, to John Kline and Darrell Issa, U.S. Congressmen (March 17, 2011).



a courtesy, a CD containing the responsive data. With respect to the request for hearing records, Mr. Heltzer stated that "the physical records for the RC cases since 2000 are voluminous and are stored around the United States in our 51 field offices, headquarters and the records center at the Washington Navy Yard."<sup>14</sup>

On March 21, 2011, the Board responded to the requests outstanding from the March 7 oversight letter.<sup>15</sup> First, we indicated that the Board had granted in part the request for an extension of time by order dated March 15, 2011. Second, we provided a CD of public and nonpublic documents referring or relating to *Specialty Healthcare* and the notice and invitation to file briefs. Third, we noted that section 4(a) of the National Labor Relations Act specifically prohibited the agency from "appointing individuals...for economic analysis."

Finally, we noted that the request was broadly worded and could be interpreted as seeking documents and communications "relating to the internal deliberations of the Board in an active case." We registered our concerns about the separation of powers, the potential chilling effect on Board Members and their legal staffs, and the risk of injury to the due process rights of the parties to the proceeding implicated by that broad reading of the request. In light of those concerns, we stated that we were not interpreting the request as seeking documents and communications "relating to the internal deliberations of the Board in an active case."

On April 18, 2011, agency staff met with your staff to discuss the *Specialty Healthcare* oversight request. On May 11, 2011, we received an oversight request reiterating the request for documents and communications related to that case.

### **The Basis of the Committee's May 11 Request**

The May 11 request relies heavily on the dissent of Member Brian Hayes from the Board's Notice and Invitation to File Briefs. The request argues that the Board's eventual decision in *Specialty Healthcare* could constitute an abuse of discretion if that decision "departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation...and where the new standard is very broad and general in scope and prospective in application."<sup>16</sup> There are no allegations of fraud, waste, abuse, or other similar misconduct in connection with the Board's consideration of the *Specialty Healthcare*

---

<sup>14</sup> Despite the challenges faced regarding the accessibility of the hearing records sought, Mr. Heltzer offered to help coordinate the Board's efforts to locate and provide any specific records the Committee might seek after reviewing the publically available responsive data.

<sup>15</sup> Letter from William B. Cowen, Solicitor National Labor Relations Board, to John Kline and Darrell Issa, U.S. Congressmen (March 21, 2011).

<sup>16</sup> Letter from John Kline, U.S. Congressman, to Wilma Liebman, Chairman National Labor Relations Board (Kline Letter to Liebman) (May 11, 2011).



case. Instead, the request's only stated concern is that that the Board's eventual decision *may* violate judicial standards for agency adjudication.

At this point in the proceeding, it is highly speculative to suggest that the Board will make any wide ranging decision, much less one that would constitute an abuse of discretion. Before issuing a decision in this case, the Board has several preliminary decisions to make. First, it must decide whether to affirm or reverse the decision of the Regional Director that the unit of 53 CNAs was appropriate. Second, it must decide whether to modify or adhere to existing precedent. Finally, the Board must decide, if it is going to modify existing precedent, how and through what process it will do that. All of those are decisions for the Board to make, and no final decision has been made.

The request concedes that the Board has "broad discretion to make rules through the adjudicatory process...."<sup>17</sup> Indeed, the Supreme Court has made clear that "the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."<sup>18</sup> Although the Supreme Court acknowledged in *Bell Aerospace* that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion...",<sup>19</sup> the court noted in that case that those concerns were "largely speculative" because the Board had yet to make a final determination in the case.<sup>20</sup>

The law is clear: unless and until the Board has issued a decision, there can be no basis for alleging that the Board has acted contrary to law.<sup>21</sup> Ultimately, Article III courts would be the proper forum for a challenge to the Board's action under the Administrative Procedure Act and the judicially constructed standard that the request asserts is the appropriate test. As to that standard, it is important to note that the issue in *Specialty Healthcare* is simply the appropriateness of the proposed bargaining unit. Thus, "this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements."<sup>22</sup> And with respect to the Board's notice and invitation to file briefs, the Supreme Court has affirmed that "the Board has discretion to decide that adjudicative procedures...may also produce the relevant information necessary to mature and fair consideration of the issues."<sup>23</sup> Ultimately, the question of whether whatever decision the Board reaches in this pending case should have been made through notice and comment rulemaking will turn on the substance of the decision itself and the express scope of its application, and nothing potentially in the Board's

---

<sup>17</sup> *Id.*

<sup>18</sup> *NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267, 294 (1974).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 295.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (ruling that the decision as to which employees properly fell within a bargaining unit did not impose new liability nor involve fines or damages).

<sup>23</sup> *Id.*

deliberative documents will be relevant to that question. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

For all these reasons, we believe that this highly unusual and intrusive request for documents and communications reflecting the internal communications of Board members and their staffs in a pending matter is premature, at best. In this regard, we reiterate that the Board is presently considering the submissions of the parties and their amici, no Board decision on the merits has yet been made, and when such a decision is made the validity of that decision is fully reviewable by the courts in accordance with the review provisions that Congress has specified in the statute.

### **The NLRB's Interests**

Based on the April 18 staff meeting and the May 11 oversight request, the Board now understands the request to be seeking deliberative, pre-decisional documents and communications related to a case currently pending before the Board. Deliberative, pre-decisional documents and communications typically in possession of the Board in connection with a pending case include:

- legal memoranda from staff attorneys (and/or more senior attorneys) to one or more Board members analyzing the case (or some aspect of the case) and recommending a particular decision on an issue or the case as a whole;
- communications related to the drafting, dissemination, or discussion of such legal memoranda;
- research memoranda related to the factual or legal issues in the case, prepared by a staff attorney or more senior attorney, for use by one or more Board members, including communications related to the drafting, dissemination, or discussion of such research memoranda;
- communications between and among an individual Board member and staff attorneys (or more senior attorneys) conveying or discussing a prospective decision in the case, including the views of other Board members and/or their staffs (these may range in formality from an e-mail to a written memorandum);
- draft decisions (in whole or in part) prepared by a Board member or staff attorney for review and approval by more senior attorneys or by one or more Board members;
- successive revisions of the draft prepared and reviewed at various levels of a Board member's staff (staff attorney, supervisor, deputy chief counsel, chief counsel), and related communications, culminating in a final approved decision;

- draft dissents (in whole or in part) prepared by a Board member or staff attorney for review and approval by more senior attorneys or by one or more Board members;
- successive revisions of the draft dissent prepared and reviewed at various levels of a Board member's staff (staff attorney, supervisor, deputy chief counsel, chief counsel), and related communications, culminating in a final approved dissent; and
- communications between Board members discussing a draft decision or dissent and prospective action on the draft, and similar communications between the staffs of the individual Board members.

At the Board, deliberative, pre-decisional documents and communications are treated with the highest level of confidentiality. Many draft documents are known only to their authors and immediate supervisors. Documents that are ultimately presented to an individual Board Member are rarely shared with other staff members not directly involved in the consideration of the case. Similarly, communications between Board Members generally are not shared beyond those involved in the immediate distribution of that communication, and it is very rare for any deliberative, pre-decisional communication to be distributed more broadly than those persons directly involved in the consideration of the case. Moreover, our information technology systems are built with security controls that protect the confidentiality of deliberative, pre-decisional materials. In short, at the Board, nothing is more confidential than these materials.

Over the 75 year history of this Agency, the Board has carefully protected the confidentiality of its deliberative, pre-decisional materials. While Board Members may, from time to time, speak about the deliberative process generally, it is a long-standing tradition that they do not publically reveal the deliberations on any particular case. Whether Republican, Democrat, or Independent, Board Members have adhered to these principles because they recognize that the Board can function effectively only in an environment where the free flow of ideas is not compromised by the fear of public disclosure of private communications.

In addition to these confidentiality interests, the courts have recognized that independent agencies conducting adjudications have a constitutional and statutory obligation to resist Congressional influence in order to protect the due process rights of the litigants.<sup>24</sup> Congressional intervention into an ongoing administrative proceeding

---

<sup>24</sup> See, e.g., *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (ruling the court would not enforce an administrative subpoena if the agency did nothing to prevent the abuse of its process by congressional influence); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (administrative decision can only be compromised by congressional intervention if "extraneous factors intruded into the calculus of consideration of the individual decisionmaker"); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set

influence that results) that raises due process concerns.<sup>30</sup> Those concerns are not diminished in any way by reviewing the documents only in an executive session. Furthermore, under the rules of the House of Representatives, any document produced by our agency to the Committee is a "committee record."<sup>31</sup> As such, each Member of the House of Representatives has a right of access to those documents.<sup>32</sup> For all practical purposes, the Board's deliberative processes in an ongoing administrative proceeding would therefore be exposed to all 435 Members of the House of Representatives. No assurances have been given that all Members with access to these documents will refrain from commenting publicly about his or her conclusions based on the Board's internal deliberations in an ongoing case. Such comments, under judicial precedent, may be sufficient to violate the due process rights of our litigants.<sup>33</sup>

For the reasons outlined above, we must respectfully decline to produce such materials at this time. If there are other documents that might be helpful to you, we would be happy to work with you to accommodate your legitimate needs without compromising the integrity of the Board's ongoing deliberative process.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.

Sincerely,



William B. Cowen  
Solicitor

cc: The Honorable Darrell Issa, Chairman  
House Committee on Oversight and Government Reform  
The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce  
The Honorable Elijah Cummings, Ranking Member,  
House Committee on Oversight and Government Reform

---

<sup>30</sup> See *Pillsbury*, 354 F.2d at 964.

<sup>31</sup> Rules of the House of Representatives, Rule XI, clause 2, § 794(e)(2)(A).

<sup>32</sup> *Id.*

<sup>33</sup> See *Pillsbury*, 354 F.2d at 964 (holding that examining how and why a decisionmaker reached a decision and then criticizing him for making the "wrong decision" sacrifices the appearance of impartiality of the decisionmaker and intrudes on the due process rights of the litigants to that case).





UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

March 18, 2011

The Honorable John Kline  
Chairman, Education and the Workforce Committee  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

In accordance with the agreement on March 4, 2011, between Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, and Marvin Kaplan of your staff, I enclose a copy of a report by National Labor Relations Board Inspector General David Berry. The report concerns advertisements on Google, which you raised in your letter to Chairman Wilma Liebman on the same date.

The Inspector General advises that this type of investigative report would not normally be made public. Accordingly, we ask that you keep it confidential. In the event you believe it is necessary and appropriate to make the document public, we have enclosed a redacted version of the report to protect the privacy of the employees named or described in it.

We will be happy to meet with you to discuss how we might accommodate any further information needs you may have in this matter. Should you have additional questions or wish to schedule a meeting, please call Jose Garza at (202) 273-1700.

Sincerely,

William B. Cowen  
Solicitor

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce

Enclosures



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14<sup>TH</sup> STREET NW, SUITE 11600  
WASHINGTON DC 20570

March 17, 2011

The Honorable John Kline  
Chairman, Education and the Workforce Committee  
The Honorable Phil Roe, M.D.  
Chairman, Subcommittee on Health, Employment,  
Labor, and Pensions  
U.S. House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

I write in response to your letter dated March 3, 2011, to National Labor Relations Board Chairman Wilma Liebman, regarding her February 18, 2011 joint statement with Acting General Counsel Lafe Solomon on the potential impact of a proposed cut of \$50 million to the NLRB's budget. Each request and our response is set forth below:

- 1. All data supporting your assertion that a \$50 million NLRB budget reduction for fiscal year 2011 would force the NLRB to furlough all of its 1,665 employees for 55 workdays between now and the end of September.**

The NLRB's spending falls into three major categories – (1) payroll costs; (2) mandatory General Services Administration rent, Federal Protective Service security charges, infrastructure maintenance, and telecommunications; and (3) operational expenses such as case handling costs, information technology, travel, and training. (See chart attached as Exhibit 1.). The majority of Agency spending, about 75.3% or \$212.3 million in FY 2010, falls in the first category. (See FY 2011 Draft Operating Plan Summary attached as Exhibit 2.) Although payroll costs can diminish over time through attrition/retirements or a reduction in force (RIF), RIF procedures take a significant amount of time and involve additional costs, and retirements actually increase costs in the near term. Thus, our Budget Office advises that the only way to achieve significant immediate savings in this category is through furloughs.

The second category of spending was 13.2% of our budget in FY 2010, or \$37 million. The only spending in this category that can be reduced in the short term is infrastructure maintenance, through the deferral of replacing carpet, paint, furniture and equipment. Indeed, FPS security costs are beyond the Agency's control and the GSA's charges can vary depending on state property tax fluctuation.

The third category of spending, operational expenses, was about 11.5% of our budget, or \$33 million in FY 2010. This is the primary area where we can make reductions that do not involve furlough days.

The analysis of a proposed cut of \$50 million from our budget was performed by the NLRB's Budget Office as part of its regular duties. In January of this year, when it seemed that some cuts to the Administration's proposed budget for the Agency for FY 2011 might be proposed, the Budget Office undertook a comprehensive review of the budget, first quarter spending, staffing, and all programs. The purpose of this review was to identify potential, viable cuts that could achieve savings this fiscal year, without severely compromising the Agency's mission. The Budget Office estimated FTE savings through attrition at 7 separations per month and assumed limited hiring at 2-3 per month to fill critical vacancies only. The estimated FTE savings totaled only about \$1.1 million.

After reviewing Agency programs and the operations budget, a set of potential cuts were identified that would have the least impact on case handling. An office relocation could be deferred; replacing carpet, paint, furniture and equipment could be deferred; scheduled building and equipment upgrades delayed or eliminated; and planned conferences postponed.

The next set of potential cuts were deemed to have an acceptable or manageable impact on case handling. For example, case handling expenses could be reduced through implementation of cost savings measures that would minimize required travel, for example, by requiring litigants to come to the NLRB's offices rather than being interviewed in the field. In addition, a variety of training programs could be curtailed, including training for new supervisors, non-supervisory attorneys, and senior Board agents hired after 1995 that had been deferred from previous years due to funding constraints.

At the time the House Appropriations Committee proposal was released, our Budget Office believed that the Agency might be able to absorb a 2% reduction (\$5.7 million) from the FY 2010 appropriation without drastic reductions in staff and core services. That is not to say that these cuts would be "easy." They would clearly have an impact on the Agency's ability to carry out its statutory

mission. In any event, a \$50 million dollar cut, less \$5.7 million in potential savings, left a shortfall of \$44.3 million.

The Budget Office calculates the NLRB's payroll costs as \$820,000 per day. That number is arrived at by dividing the total two week payroll of \$8.2 million (see Exhibit 3) by 10 work days in a pay period. Dividing the \$44.3 million shortfall by \$820,000 yields just over 54 furlough days, which was rounded to 55 furlough days in order to completely satisfy the targeted cuts. That number was relied on by Agency officials and was used in the February 18 statement by Chairman Liebman and Acting General Counsel Solomon.

**2. All documents and communications relating to the February 18, 2011 joint statement you issued with Acting General Counsel Lafe Solomon relating to the \$50 million NLRB budget reduction.**

The universe of documents that is potentially responsive to this request is enormous since, for example, every payroll record and every case record maintained by the Agency bears some connection to the joint statement. The discussion in response to question 1 above and the following discussion and additional attachments are intended to answer your questions concerning the basis for the assertion in the statement concerning furloughs that we understand is the focus of this request.

At the conclusion of the January review discussed above, the Budget Office prepared a Cost Savings Scenario chart to summarize possible responses to different budget scenarios. The chart, which is attached as Exhibit 4, layers and prioritizes the potential cuts, depending on the amount of the reduction required by a final FY 2011 budget.

As discussed above, the Budget Office initially calculated the impact of a \$50 million budget cut as requiring 55 furlough days. The Budget Office then prepared a new version of the Cost Savings Scenario chart. That chart, which is attached as Exhibit 5, adds the additional cuts to personnel costs onto the estimated cuts to operational expenses already projected, in order to reach the level of cuts required by the Appropriations Committee bill.

The total number of furlough days noted in the final version of the chart is 51.9. That number, like the 55 days calculated immediately after the budget proposal was released is, of course, an estimate. The actual number of furloughs could be higher or lower depending on how accurate the estimates of a number of variables underlying the overall estimate turn out to be. These variables include:

- Monthly attrition (estimated at seven FTEs a month)



The Honorable John Kline  
The Honorable Phil Roe, M.D.  
March 17, 2011  
Page 5 of 5

(including annual leave payouts for staff leaving the federal government), GSA costs, and travel costs (in light of increased fuel prices.)

For example, if attrition turns out to be 3-4 per month, instead of 7 per month, the estimated savings would be reduced by \$630,000. An increase in case intake and the rising cost of fuel could easily eliminate the \$305,000 in case handling travel savings that the Budget Office's earlier analysis assumed. Variables such as these make precise calculations and predictions very difficult, but our Budget Office strives to provide the most accurate and complete information possible to the heads of the Agency so they can plan the Agency's work and understand the potential impact of various budget proposals.

We trust that the information provided in this letter and the attachments hereto are sufficient to address any concerns you may have about the February 18 joint statement. As previously discussed with Marvin Kaplan, we will make the head of our Budget Office available at your convenience to walk through the documents we have provided and answer any questions you may have about them. After or at that briefing, we will be happy to meet with you to discuss how we might accommodate any further information needs you may have regarding the joint statement. Please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-1700 if you would like to set up such a meeting or have further questions.

Sincerely,



William B. Cowen  
Solicitor

cc: The Honorable George Miller, Ranking Member,  
House Committee on Education and the Workforce  
The Honorable Rob Andrews, Ranking Member,  
Subcommittee on Health, Employment, Labor, and Pensions  
Marvin Kaplan, Professional Staff Member,  
House Committee on Education and the Workforce

Enclosures



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

October 12, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. In addition, I am enclosing as a courtesy documents that are being produced to a Freedom of Information Act requester. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

September 18, 2012

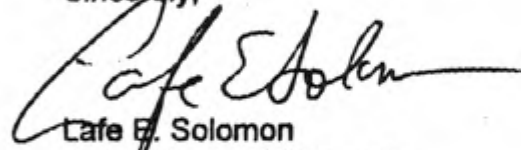
The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made to subpoena responsive documents include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,



Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

September 18, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

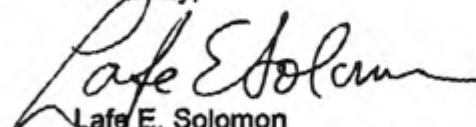
Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

July 16, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

---

Dear Chairman Kline and Chairman Roe:

Today, the Office of the General Counsel is enclosing documents that are being produced to Freedom of Information Act requesters pursuant to the Agency's administrative review process. The majority of the enclosed documents were previously produced to the Committee in unredacted form.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

July 16, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. In addition, I am enclosing documents that are being produced to a Freedom of Information Act requester as a courtesy. The redactions made to subpoena responsive documents include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

July 16, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

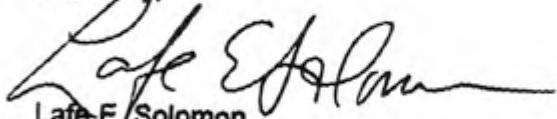
Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. In addition, I am enclosing as a courtesy documents that are being produced to a Freedom of Information Act requester. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,



Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

July 16, 2012

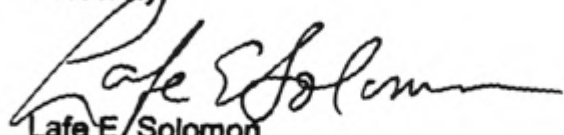
The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-8143

Dear Chairman Issa:

Today, the Office of the General Counsel is enclosing documents that are being produced to Freedom of Information Act requesters pursuant to the Agency's administrative review process. The majority of the enclosed documents were previously produced to the Committee in unredacted form.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

June 18, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-8143

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 31, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

I write in response to your May 17, 2012 letter regarding the federal court litigation of the National Labor Relations Board's (NLRB's) notice poster rule. Currently, an appeal is pending before the U.S. Court of Appeals for the District of Columbia. As you may know, the D.C. Circuit has set a briefing schedule and the NLRB's brief is due at the end of June. Although the NLRB has publicly stated its intent to appeal the decision of the South Carolina district court, the notice of appeal has not yet been filed and there is no briefing schedule set in the U.S. Court of Appeals for the Fourth Circuit.

With respect to your question regarding how the NLRB would enforce the regulation nationwide "in the event federal circuits take conflicting views on the legality of the regulation," that would depend on what issues are resolved by those circuit court decisions and the nature of the conflicts that remain. Until the circuit courts have issued their rulings, and it has become clear whether any potential split in the circuits will be reviewed by the Supreme Court, it is impossible to say how it would be appropriate for the NLRB to proceed in conformity with those entirely hypothetical opinions at present.

Until this matter has been finally resolved by the courts, I have instructed my staff to keep Committee staff up to date on the progress of the litigation. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

Lafe E. Solomon  
Acting General Counsel

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 4, 2012

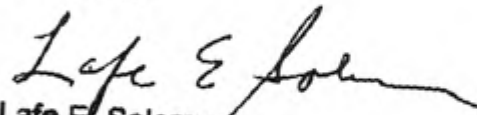
The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 4, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-8100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-8100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 18, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in cursive script that reads 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

April 18, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

I write in response to your April 4, 2012, letter requesting information from January 20, 2009, to present about cases related to *Communications Workers of America et al. v. Beck et al.*, 487 U.S. 735 (1988). Your questions and my responses are set forth below.

1. Please expand on any personal interest you have in *Beck* issues.

My personal interest in *Beck* issues is not unlike my interest in other matters enumerated in Memorandum GC 11-11. It is, simply stated, to ensure that our statute is enforced. Since 1998, the Office of the General Counsel has consistently enforced the same policy with respect to *Beck* objectors. See, Memorandum GC 98-11, Guidelines Concerning Processing of *Beck* Cases, August 17, 1998. Over the last three years, cases involving *Beck* objectors have resulted in favorable Board decisions and workers have received offers of reinstatement, back pay, and dues and fees reimbursement totaling about \$118,000.

2. How many alleged *Beck* violations are currently pending before the Office of the General Counsel? There are 118 alleged *Beck* violations currently pending in the Regional Offices of the Office of the General Counsel.

a. How many alleged *Beck* violations have resulted in the issuance of a complaint? 17

b. How many alleged *Beck* violations have resulted in the issuance of a settlement? 147

i. What type of relief has been provided to workers who received a settlement? Workers, who have alleged *Beck* violations in addition to other violations of the Act, have received a cumulative total of about \$118,000.00 in back pay and dues and fees reimbursement, and 9 workers were offered reinstatement. For more details see the enclosed chart.

c. How many alleged *Beck* violations have been dismissed without the issuance of a complaint? Please explain the basis of each dismissal. 175. In fiscal year 2011, approximately 28% of all charges filed resulted in a settlement and approximately 6% of all charges filed resulted in the issuance of a complaint. Similar data for other fiscal years is available on the Agency's website at <http://www.nlrb.gov/charges-and-complaints>. Please see the enclosed chart to see a list of all closed cases. For all



cases dismissed on or after June 1, 2011, final dismissal letters should be posted on the Agency's website. Memorandum GC 11-12, Drafting and Redacting Agency Documents, April 29, 2011.

3. How many alleged *Beck* violations are pending before the Board? 3
  - a. How many alleged *Beck* violations have been decided by the Board? 7
  - b. How many of these cases have been decided in favor of the union? 1
  - c. How many of these cases have been decided in favor of the worker? 6
4. What is the average amount of time it takes the Office of the General Counsel to process an alleged *Beck* violation – from the filing date to a final disposition? Please provide an accounting of each alleged *Beck* violation and the length of time it took for the charge to reach a final disposition. 89.7 days. See enclosed chart.
  - a. How does the average amount of time it takes to process an alleged *Beck* violation compare to the average amount of time it takes to process other unfair labor practice charges? In fiscal year 2011, the Office of the General Counsel closed 72.5% of all C cases within 120 days. This data for other fiscal years can be found in the Agency's annual performance and accountability reports, which are available on line at <http://www.nlr.gov/annual-reports>.
5. What is the average amount of time it takes for the Board to issue a decision in an alleged *Beck* violation? Please provide an accounting of each alleged *Beck* violation decided by the Board and the length of time it took to render a decision. Please see enclosed chart.
6. Does the Office of the General Counsel maintain the policy outlined in a 1998 General Counsel Memorandum that an unfair labor charge alleging improper agency fee charge should be dismissed if the objecting party generally asserts that he has been improperly charged? The Office of the General Counsel maintains a policy in *Beck* cases, consistent with its policy with regard to other types of unfair labor practice allegations, that requires a charging party to present evidence and preliminary information which points to a prima facie case of a violation before the General Counsel will obtain and investigate the respondent's defense. NLRB Casehandling Manual, Unfair Labor Practices, Sec. 10054.4
  - a. Does the Office of the General Counsel maintain the policy that a worker must "present evidence or ... give promising leads that would lead to evidence that would support [a *Beck* violation]?" Under the policy set forth in the answer above, a *Beck* objector must provide some evidence, or at least a promising lead of evidence, in support of an assertion that he or she is being unlawfully charged for a particular expenditure identified by the union as representational. Memorandum GC 98-11, Guidelines Concerning Processing of *Beck* Cases, August 17, 1998. If he or she does not provide some such evidence or a promising lead of such evidence, the charge will be dismissed. Further, a *Beck* objector can always challenge the union's *Beck*-objector fee through the internal challenge procedure that the union is legally required to maintain, and the burden is on the union to establish that the expenditure is related to representational activities. Evidence presented during this proceeding can be used in support of an unfair labor practice charge filed with our Agency.

b. How does the Office of the General Counsel define a "promising lead?" As set forth in the answer above, a "promising lead" is evidence or information which points to a prima facie case of a violation. Charging parties can meet this burden by presenting evidence or other information that some of the expenditures claimed as chargeable were for non-representational activities. If a charging party raises a question regarding the chargeability of a category of expenses that could potentially include non-representational matters (e.g., the cost of a union news letter, which often address both non-representational and representational issues), the Office of the General Counsel would seek the union's explanation as to why those expenses were treated as representational and, if that explanation is not satisfactory, a complaint would issue.

c. How many cases have been dismissed by the Office of the General Counsel because a worker could not "present evidence" or a "promising lead" of an alleged *Beck* violation?  
1

7. Does the Office of the General Counsel maintain the policy that "cases raising questions as to whether the charging party has met [the evidence burden] should be submitted to the Division of Advice?" Although Regional Offices were originally directed to submit these cases to the Division of Advice, there has been no such instruction in place since 2002. However, Regional Offices have the discretion to submit any case to the Division of Advice. Since January 20, 2009, there have been two such cases submitted.

a. If so, how many cases of alleged *Beck* violations has the Division of Advice determined to have met the burden? 1

b. How many cases of alleged *Beck* violations has the Division of Advice determined has not met the burden? 1

8. Does the Office of the General Counsel maintain the policy that the union must verify by an audit that the chargeable and non-chargeable expenditures were made? The Office of the General Counsel follows extant Board law, which requires that unions verify by an independent audit that the claimed chargeable and non-chargeable expenditures were made. See *Television Artists AFTRA (KGW Radio)*, 327 NLRB 474 (1999).

9. How many cases have been referred to the Division of Advice concerning the "type and level of audits unions must give *Beck* objectors?" 1

a. What is the current status of such cases? The Division of Advice authorized complaint and the case is pending.

b. How many resulted in the issuance of a complaint? 1

c. How many have been dismissed? 0

d. How many are pending before the Board? 0

10. How many cases have been referred to the Division of Advice that concern "whether *Beck* objectors are entitled to audits along with the notice of their *Beck* rights?" 0

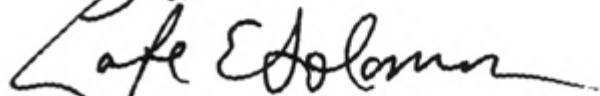
a. What is the current status of such cases? N/A

- b. How many resulted in the issuance of complaint? N/A
- c. How many have been dismissed? N/A
- d. How many are pending before the Board? N/A

11. Did you participate in advising the Board in its issuance of the "Employees Rights Under the National Labor Relations Act" poster rule? If so did you advise the Board they should consider including in the notice notification of a workers' *Beck* rights under the National Labor Relations Act in the poster? If not, why not? No, I did not participate in advising the Board in its issuance of the "Employees Rights Under the National Labor Relations Act" poster rule.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,



Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6113

April 4, 2011

Mr. Lafe Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570-0001

Dear Mr. Solomon:

The House Committee on Oversight and Government Reform is examining the use of union dues and fees to fund political causes contrary to the will of many union workers. On February 8, 2012, the Committee held a hearing entitled, "The Right to Choose: Protecting Union Workers from Forced Political Contributions," that featured three union workers who testified that their rights are being violated by the use of their dues to support political activity. The full hearing video and testimony of all of the witnesses are available at <http://issues.oversight.house.gov/worker-rights>. I write to request additional information to further inform the Committee in its oversight of these issues.

It is indisputable that union political speech is subject to First Amendment protections; however, the First Amendment also protects against compelled speech of union workers. Indeed, the U.S. Supreme Court has long recognized that constitutional and statutory protections exist to protect a limited number of union workers from forced political contributions.<sup>1</sup> In a significant victory for these union workers, the Supreme Court held in *Communications Workers of America et al. v. Beck et al.*, that the National Labor Relations Act does not allow a union, over the objection of dues-paying nonmember workers, to spend fees on activities unrelated to collective bargaining and other representational activities.<sup>2</sup> Subsequent to this decision, the National Labor Relations Board (NLRB) mandated that unions abide by limited notification procedures to inform a union worker of their *Beck* rights and to object to non-representational expenditures by the union.<sup>3</sup>

<sup>1</sup> See, *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

<sup>2</sup> *Communications Workers of America et al. v. Beck et al.*, 487 U.S. 735 (1988).

<sup>3</sup> See, *California Saw*, 320 NLRB 224, 233 (1995), enf'd 133 F.3d 1012 (7th Cir. 1998).

Nevertheless, worker rights advocates have expressed concern that significant government and union-imposed barriers remain for workers to exercise their rights.<sup>4</sup> Federal notification requirements have been rolled back under the Obama Administration, and Terry Bowman, a "proud" UAW member, testified at the hearing that he believes the UAW places only a "small paragraph" in its *Solidarity Magazine* just once a year to notify its workers about their *Beck* rights.<sup>5</sup> Further, it appears that the UAW requires that *Beck* objections must be renewed each year.<sup>6</sup> Disturbingly, Mr. Bowman explained that "workers who [do] exercise their *Beck* rights are frequently the victims of humiliation, persecution and harassment on the job for resigning their union membership, and union officials do nothing to stop or even discourage this intimidating tactic."<sup>7</sup>

It appears that "*Beck* issues" are a "policy issue in which [you are] particularly interested."<sup>8</sup> In light of this interest, and to assist the Committee in its examination of these issues, I request that you answer the following questions and provide relevant documents to substantiate your responses from the time period January 20, 2009, to present. A response is requested by April 18, 2012. For the purpose of the questions, an alleged "*Beck* violation" is defined as the collection of union fees as a condition of employment in excess of what is permitted under the Supreme Court's decision in *Communications Workers v. Beck* or without providing one or more of the procedural protections required under *Beck* as applied by the courts and the Board.

1. Please expand on any personal interest you have in *Beck* issues.
2. How many alleged *Beck* violations are currently pending before the Office of General Counsel?
  - a. How many alleged *Beck* violations have resulted in the issuance of a complaint?
  - b. How many alleged *Beck* violations have resulted in a settlement?
    - i. What type of relief has been provided to workers who received a settlement?
  - c. How many alleged *Beck* violations have been dismissed without the issuance of a complaint? Please explain the basis for each dismissal.

---

<sup>4</sup> Raymond J. LaJeunesse, Jr., Esq., *Workers' Experiences in Attempting to Exercise Their Rights Under Communications Workers v. Beck and Related Cases*, Engage Volume 3 Apr. 2002.

<sup>5</sup> *The Right to Choose: Protecting Union Workers from Forced Political Contributions: Hearing Before the H. Comm. on Oversight & Govt. Reform*, 112<sup>th</sup> Cong. (2012) (Testimony of Terry Bowman).

<sup>6</sup> See UAW About, "Notice to persons covered by union security agreements regulated under National Labor Relations Act," available at <http://www.uaw.org/page/notice-persons-covered-union-security-agreements-regulated-under-national-labor-relations-act> (last visited March 8, 2012).

<sup>7</sup> *The Right to Choose: Protecting Union Workers from Forced Political Contributions: Hearing Before the H. Comm. on Oversight & Govt. Reform*, 112<sup>th</sup> Cong. (2012) (Testimony of Terry Bowman).

<sup>8</sup> Memorandum GC 11-11, Office of the General Counsel, *Mandatory Submissions to Advice*, Apr. 12, 2011.



3. How many alleged *Beck* violations are pending before the Board?
  - a. How many alleged *Beck* violations have been decided by the Board?
  - b. How many of these cases have been decided in favor of the union?
  - c. How many of these cases have been decided in favor of the worker?
4. What is the average amount of time it takes the Office of General Counsel to process an alleged *Beck* violation—from the filing date to a final disposition? Please provide an accounting of each alleged *Beck* violation and the length of time it took for the charge to reach a final disposition.
  - a. How does the average amount of time it takes to process an alleged *Beck* violation compare to the average amount of time it takes to process other unfair labor practice charges?
5. What is the average amount of time it takes for the Board to issue a decision in an alleged *Beck* violation? Please provide an accounting of each alleged *Beck* violation decided by the Board and the length of time it took to render a decision.
6. Does the Office of General Counsel maintain the policy outlined in a 1998 General Counsel Memorandum that “an unfair labor charge alleging improper agency fee charges should be dismissed if the objecting party generally asserts that he has been improperly charged?”<sup>9</sup>
  - a. Does the Office of General Counsel maintain the policy that a worker must “present evidence or ... give promising leads that would lead to evidence that would support [a *Beck* violation]?”<sup>10</sup>
  - b. How does the Office of General Counsel define a “promising lead?”
  - c. How many cases have been dismissed by Office of General Counsel because a worker could not “present evidence” or a “promising lead” of an alleged *Beck* violation?
7. Does the Office of General Counsel maintain the policy that “cases raising questions as to whether the charging party has met [the evidence burden] should be submitted to the Division of Advice?”<sup>11</sup>
  - a. If so, how many cases of alleged *Beck* violations has the Division of Advice determined to have met the burden?

---

<sup>9</sup> Memorandum GC 98-11, Office of the General Counsel, *Guidelines Concerning Processing of Beck Cases*, Aug. 17, 1998.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

- b. How many cases of alleged *Beck* violations has the Division of Advice determined has not met the burden?
8. Does the Office of General Counsel maintain the policy that the union must verify by an audit that the chargeable and non chargeable expenditures claimed were made?
9. How many cases have been referred to the Division of Advice concerning "the type and level of audits unions must give *Beck* objectors?"<sup>12</sup>
  - a. What is the current status of such cases?
  - b. How many have resulted in the issuance a complaint?
  - c. How many have been dismissed?
  - d. How many are pending before the Board?
10. How many cases have been referred to the Division of Advice that concern "whether *Beck* objectors are entitled to audits along with the notice of their *Beck* rights?"<sup>13</sup>
  - a. What is the current status of such cases?
  - b. How many resulted in the issuance of a complaint?
  - c. How many have been dismissed?
  - d. How many are pending before the Board?
11. Did you participate in advising the Board in its issuance of the "Employee Rights Under the National Labor Relations Act" poster rule?<sup>14</sup> If so, did you advise the Board that they should consider including in the notice notification of a workers' *Beck* rights under the National Labor Relations Act in the poster? If not, why not?

In preparing your answers to these questions, please answer each question individually and include the text of each question with your response. When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

---

<sup>12</sup> Memorandum GC 11-11, Office of the General Counsel, *Mandatory Submissions to Advice*, Apr. 12, 2011.

<sup>13</sup> *Id.*

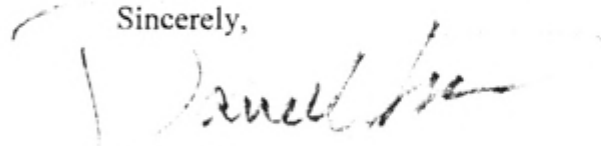
<sup>14</sup> See National Labor Relations Act, Employee Rights under the National Labor Relations Act, available at <http://www.nlrb.gov/sites/default/files/documents/1562/employeeerightsposter-8-5x11.pdf>.

Mr. Lafe Solomon  
April 4, 2012  
Page 5 of 5

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact the Committee at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Darrell Issa", is written over a faint, larger outline of the same signature.

Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

---

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States****House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (202) 225-5074

Minority (202) 225-5051

**Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.



17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

April 11, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline:

Thank you for your interest in the Office of the General Counsel's (OGC's) proposed pilot program to reorganize Regions 14, 17, 25 and Subregion 33. I appreciate the opportunity to discuss this proposal.

In March of last year, I testified before the Labor, HHS Subcommittee of the House Committee on Appropriations. During that hearing, I assured the Committee that the OGC is committed to adjusting to the realities of declining national case intake and budget uncertainty. One month later, the National Labor Relations Board's Office of Inspector General issued an audit report that included relevant data and recommendations. Since that time, I have directed my staff to seek out long-term, national solutions that guarantee efficient use of agency resources and continued exemplary service to the public.

The proposed pilot program to reorganize Regions 14, 17, 25 and Subregion 33 is designed to test the effects of consolidation on some of our offices. Among our goals is to equalize office sizes in order to move towards a model where case intake in one office is more consistent with case intake in others. To that end, we have proposed a pilot program for consolidation of our St. Louis office, exclusive of our Peoria Subregional Office, with our Kansas City Regional Office, inclusive of the Tulsa Resident Office. During the proposed pilot, the Peoria Subregional Office would be consolidated with our Indianapolis Regional Office.

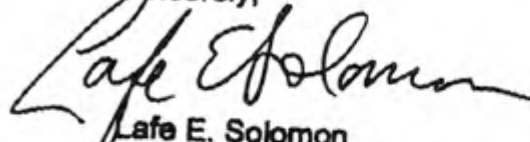
Should the pilot proceed, the top management structure for Regions 14 and 17 will be combined under the sitting Director of Region 17, and the responsibility for oversight of Subregion 33, Peoria, will be assumed by the sitting Director of Region 25, Indianapolis. Please be assured that the proposed restructuring pilot does not carry with it a final decision that either Region 17, Kansas City, or Region 14, St. Louis, will be the ultimate home of a sitting Regional Director. Rather, the proposed pilot merely affords the Agency the opportunity to assess the performance of a combined Regional Office.

Likewise, there is no plan to close any Regional, Subregional or Resident Office under the proposed pilot. Rather, the proposed pilot is designed to provide insight into ways to minimize any anticipated and unanticipated obstacles resulting from restructuring that would tend to interfere with each office's casehandling effectiveness. It is expected that the Regional Director's goal of regularly travelling between offices and the Agency's significant technological accomplishments – including the Federal Government's leading legal case management system – will allow all offices to remain efficient, responsive organizations during the pilot period. Should the consolidation proceed, as with the pilot, there would be no plan to close any office.

Thus far, this office has received robust input from various stakeholders. In February, we announced the proposed pilot program to the Practice and Procedure Committee of the Section of Labor and Employment Law of the American Bar Association. As a result of that announcement, a group of practitioners in St. Louis, Missouri requested and received a telephone briefing by this office. Subsequently, a group of local union officials in Illinois requested and received a telephone briefing by this office. In addition to those briefings, this office has received letters from members of Congress and other members of the Illinois and Missouri communities. Those letters are enclosed.

I intend to make a decision as to whether to institute the pilot program within the next few days. I look forward to working with you on this Agency's efforts to achieve efficient use of our resources. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you have additional questions regarding this matter.

Sincerely,



Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce

MAJORITY MEMBERS

JOHN KLINE, MINNESOTA, Chairman

THOMAS E. PETRI, WISCONSIN  
HOWARD P. "BUCK" MCKEON, CALIFORNIA  
JUDY BIGGERT, ILLINOIS  
TODD RUSSELL PLATT, PENNSYLVANIA  
JOE WILSON, SOUTH CAROLINA  
VIRGINIA FOXX, NORTH CAROLINA  
BOB GOODLATTE, VIRGINIA  
DUNCAN HUNTER, CALIFORNIA  
DAVID P. ROE, TENNESSEE  
GLENN THOMPSON, PENNSYLVANIA  
TIM WALBERG, MICHIGAN  
SCOTT DENJARLAIS, TENNESSEE  
RICHARD L. HANNA, NEW YORK  
TODD ROKITA, INDIANA  
LARRY BUCSHON, INDIANA  
TREY GOWDY, SOUTH CAROLINA  
LOU BARLETTA, PENNSYLVANIA  
KRISTI L. NOEM, SOUTH DAKOTA  
MARTHA ROBY, ALABAMA  
JOSEPH J. HECK, NEVADA  
DENNIS A. ROSS, FLORIDA  
MIKE KELLY, PENNSYLVANIA



COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
2181 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

MINORITY MEMBERS

GEORGE MILLER, CALIFORNIA,  
Senior Democratic Member

DALE E. KILDEE, MICHIGAN, Vice Chairman  
ROBERT E. ANDREWS, NEW JERSEY  
ROBERT C. BOBBY, SCOTT, VIRGINIA  
LYNN C. WOOLSEY, CALIFORNIA  
RUBEN HINOJOSA, TEXAS  
CAROLYN MCCARTHY, NEW YORK  
JOHN F. TIERNEY, MASSACHUSETTS  
DENNIS J. KUCINICH, OHIO  
RUSH D. HOLT, NEW JERSEY  
SUSAN A. DAVIS, CALIFORNIA  
RAUL M. GRIJALVA, ARIZONA  
TIMOTHY H. BISHOP, NEW YORK  
DAVID LOEBACK, IOWA  
MAZIE HIRONO, HAWAII  
JASON ALTMIRE, PENNSYLVANIA  
MARCIA L. FUDGE, OHIO

March 28, 2012

Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

Dear Acting General Counsel Solomon:

I respectfully request a briefing on and documents and communications related to the St. Louis, Missouri and Kansas City, Kansas National Labor Relations Board (NLRB) regional office consolidation pilot program your office is considering. The efficient operation of the NLRB is of the utmost importance to this committee, employees, and employers.

Last year, the NLRB's Office of Inspector General (OIG) issued an audit report on case processing costs.<sup>1</sup> Regional efficiency was evaluated by computing a "production unit" cost.<sup>2</sup> The OIG found that the cost per production unit varied significantly between the regions. The NLRB's Region 5 office, serving the Baltimore area, had a cost per production unit<sup>3</sup> of \$1,788.54 and employed eight managers and supervisors and 20 professional employees.<sup>4</sup> In contrast, Region 26 office, serving the Memphis area, had a cost per production unit of \$2,741.22 and employed seven managers and supervisors and 11 professional employees.<sup>5</sup> Based on its findings, the OIG recommended that the NLRB could achieve greater efficiencies by "consolidating offices and eliminating positions in overstaffed Regions by attrition."<sup>6</sup> Additionally, it recommended "relocating offices in high rent urban office districts to locations that offer lower lease costs when the relocation will result in cost savings."<sup>7</sup>

<sup>1</sup> *NLRB Case Processing Costs Report*, OIG-AMR-64-11-02 (April 7, 2011).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> Cost Per Unit = Total Production Units / Case Processing Cost. For example, Boston's total production units were 2,780.09 and case processing costs were \$5,671,964.86, therefore, the cost per unit was \$2,040.21. *Id.* at 6.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.*

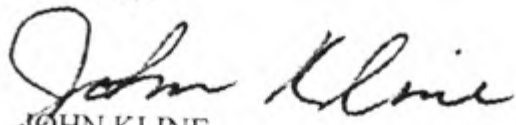


On February 27, 2012, you announced consideration of a pilot program to "consolidate Regional Offices in St. Louis, Missouri (Region 14) and Kansas City, Kansas (Region 17)."<sup>8</sup> The release states that you will "thoroughly consider input from Agency staff and from external stakeholders, including practitioners, members of the management-labor relations community, and Members of Congress, before making a final decision about whether to proceed with the pilot program."<sup>9</sup> To enable the committee to better understand the scope of the reorganization, the issues involved, the interests of internal and external stakeholders, and to ensure the efficient operation of the NLRB, please contact committee staff to arrange a briefing and provide the following no later than April 11, 2012:

1. All documents and communications relating to the pilot program to consolidate Region 14 and 17 offices;
2. A list of all outside parties from which the NLRB has received documents and communications relating to the pilot program to consolidate Region 14 and 17 offices; and
3. A list of all meetings held with external stakeholders relating to the pilot program to consolidate Region 14 and 17 offices, including a list of stakeholders in attendance, the date of the meeting, and a summary of the meeting.

To arrange the briefing or request additional information, please contact Marvin Kaplan, House Education and the Workforce Committee, at (202) 225-7101.

Sincerely,



JOHN KLINE

Chairman

Committee on Education and the Workforce

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee

<sup>8</sup> *Pilot Program Under Consideration to Consolidate Regional Offices*, National Labor Relations Board (February 27, 2012).

<sup>9</sup> *Id.*

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON EDUCATION AND THE WORKFORCE

MAJORITY OFFICE

2181 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

OFFICIAL BUSINESS

*John Klein*  
M.C.

Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14th Street, N.W.  
Washington, DC 20570

11/11/11 11:11 AM

CUXASPA 20005



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

April 9, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

Today, the Office of the General Counsel is enclosing documents that are being produced to Freedom of Information Act requesters pursuant to the Agency's administrative review process.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in cursive script, reading 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

April 9, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-8100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-8100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lyle E. Solomon'.

Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

April 9, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

March 20, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Please find enclosed a CD containing mostly unredacted emails responsive to the Committee's February 13, 2012 request for information. The redactions made in this production include material that is personal privacy information. Aside from those redactions, the Committee is receiving some information that is not being disclosed to the public pursuant to FOIA.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lyle E. Solomon'.

Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

March 20, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

March 13, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving all information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

March 13, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

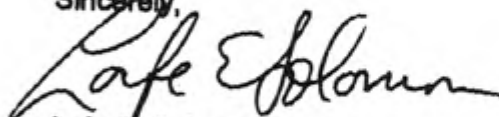
Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

February 22, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel, on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving some information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

February 22, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

February 7, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing mostly unredacted emails responsive to that subpoena. The redactions made in this production include material that is not germane to the request or is personal privacy information. Aside from those redactions, the Committee is receiving some information that is not being disclosed to the public pursuant to FOIA.

This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lyle E. Solomon'.

Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

February 7, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

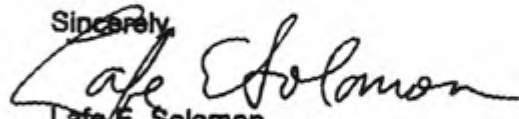
The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint, and the multitude of documents already provided to the Committee germane to those matters.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,  
  
Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

January 17, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the collective-bargaining agreement reached between the Boeing Company (Boeing) and the International Association of Machinists (IAM) and the dismissal of the Boeing complaint, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement our January 3, 2012 CD containing emails responsive to the Committee's request and my December 20, 2011 letter explaining the legal and factual basis of the complaint and the events leading up to the withdrawal of the complaint against Boeing.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the Committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lyle E. Solomon'.  
Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

January 17, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Today, in response to the Committee's December 14, 2011 request for additional information regarding the collective-bargaining agreement reached between the Boeing Company (Boeing) and the International Association of Machinists (IAM) and the dismissal of the Boeing complaint, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement our January 3, 2012 CD containing emails responsive to the Committee's request and my December 20, 2011 letter explaining the events leading up to the withdrawal of the complaint against Boeing.

The redactions made in this production include material that is not germane to the request or is personal privacy information. This office continues to collect and review documents consistent with the search parameters agreed to with the Committee. Thus far, many of the documents that contain the agreed upon search terms are not germane to the Committee's request. We will continue to thoroughly search and review those documents and would appreciate the opportunity to continue to discuss with the Committee ways to prioritize our search based on the Committee's ongoing interest in this matter.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lyle E. Solomon'.

Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform





**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

January 3, 2012

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

Today, in response to your December 16, 2011 request for additional information about the theory and disposition of the Boeing case, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the legal and factual basis of the complaint and the events leading up to the withdrawal of the complaint against Boeing.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the Committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

January 3, 2012

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Today, in response to the Committee's December 14, 2011 request for additional information regarding the collective-bargaining agreement reached between the Boeing Company (Boeing) and the International Association of Machinists (IAM) and the dismissal of the Boeing complaint, I have enclosed a CD containing mostly unredacted emails responsive to that request. I provide these communications in order to supplement my December 20, 2011 letter explaining the events leading up to the withdrawal of the complaint against Boeing.

The redactions made in this production include material that is not germane to the request or is personal privacy information. As described in my December 20, 2011 letter, this office will continue to provide responsive documents to the Committee on a rolling basis as the collection and review process continues.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



UNITED STATES GOVERNMENT

**NATIONAL LABOR RELATIONS BOARD**

**Division of Operations Management**

1099 14<sup>th</sup> Street, NW, Suite 10200

Washington, D.C. 20570

(202) 273-2900 (Phone)

(202) 273-4274 (Fax)

February 22, 2008

Honorable Dennis J. Kucinich, Chairman  
Domestic Policy Subcommittee  
House of Representatives Committee on  
Oversight and Government Reform  
Attn.: Jaron Bourke, Staff Director  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Hand Delivery

Re: Representation Cases raising supervisory issues under  
*Oakwood Health Care, Inc.*, *Croft Metals, Inc.*, and  
*Golden Crest Healthcare Center*

Dear Chairman Kucinich:

This is in response to your letter dated February 1, 2008, addressed to General Counsel Ronald Meisburg, requesting information concerning all representation cases pending, and newly filed since September 29, 2006, when the Board issued its Orders in *Oakwood Health Care, Inc.*, 348 NLRB # 37, *Croft Metals, Inc.*, 348 NLRB #38; and *Golden Crest Healthcare Center*, 348 NLRB #39, which raised similar issues. We appreciate your agreement to extend the time for supplying this information until February 26, 2008.

General Counsel Meisburg asked me to collect and provide you with the requested information. The enclosed CD contains individual folders for each representation case in which supervisory issues were raised, and the holdings of the *Oakwood Healthcare* cases were considered and applied. For your convenience, I have organized the folders into categories: Cases pending before the Board; Cases remanded by the Board to the Regions; Cases filed before October 1, 2006; and Cases filed after October 1, 2006. Each case folder contains a copy of the petition, and a completed "questionnaire" which provides responses to the items set forth in your letter. When applicable, I have also included copies of pre-election decisions, and post-election reports issued by the regional offices, as well as decisions issued by the Board.

Shortly after receiving your information request, I discussed the request with Staff Director Jaron Bourke. I clarified with Mr. Bourke that the National Labor Relations Board

does not maintain formal or informal records which would show whether parties agree to, or execute collective-bargaining agreements. This information would only be obtained during the course of investigating and processing subsequently filed unfair labor practice charges, or representation cases. Accordingly, the questionnaire for each case includes questions regarding newly filed unfair labor practice charges and representation petitions.

Please contact me at (202) 273-2104 or [Terry.Morgan@NLRB.gov](mailto:Terry.Morgan@NLRB.gov) if you need assistance with the electronic files, or require any additional information.

I trust the enclosed information is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry Morgan", with a long horizontal flourish extending to the right.

Terry Ann Morgan  
Deputy Assistant General Counsel

Enclosure

HENRY A. WAXMAN, CALIFORNIA,  
CHAIRMAN

TOM LANTOS, CALIFORNIA  
EDOLPHUS TOWNS, NEW YORK  
PAUL E. KANJORSKI, PENNSYLVANIA  
CAROLYN B. MALONEY, NEW YORK  
ELIJAH E. CUMMINGS, MARYLAND  
DENNIS J. KUCINICH, OHIO  
DANNY K. DAVIS, ILLINOIS  
JOHN F. TIERNEY, MASSACHUSETTS  
WM. LACY CLAY, MISSOURI  
DIANE E. WATSON, CALIFORNIA  
STEPHEN F. LYNCH, MASSACHUSETTS  
BRIAN HIGGINS, NEW YORK  
JOHN A. YARMUTH, KENTUCKY  
BRUCE L. BRALEY, IOWA  
ELEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
BETTY McCOLLUM, MINNESOTA  
JIM COOPER, TENNESSEE  
CHRIS VAN HOLLEN, MARYLAND  
PAUL W. HODES, NEW HAMPSHIRE  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JOHN P. SARBANES, MARYLAND  
PETER WELCH, VERMONT

ONE HUNDRED TENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5051  
FACSIMILE (202) 225-4784  
MINORITY (202) 225-5074

[www.oversight.house.gov](http://www.oversight.house.gov)

February 1, 2008

TOM DAVIS, VIRGINIA,  
RANKING MINORITY MEMBER

DAN BURTON, INDIANA  
CHRISTOPHER SHAYS, CONNECTICUT  
JOHN M. McHUGH, NEW YORK  
JOHN L. MICA, FLORIDA  
MARK E. SOUDER, INDIANA  
TODD RUSSELL PLATT, PENNSYLVANIA  
CHRIS CANNON, UTAH  
JOHN J. DUNCAN, JR., TENNESSEE  
MICHAEL R. TURNER, OHIO  
CARRELL E. ISSA, CALIFORNIA  
KENNY MARCHANT, TEXAS  
LYNN A. WESTMORELAND, GEORGIA  
PATRICK T. McHENRY, NORTH CAROLINA  
VIRGINIA FOXX, NORTH CAROLINA  
BRIAN P. BILBRAY, CALIFORNIA  
BILL SALL, IDAHO  
JIM JORDAN, OHIO

Mr. Ronald Meisburg  
General Counsel  
National Labor Relations Board  
1099 Fourteenth Street, NW  
Washington, DC 20570

Dear Mr. Ronald Meisburg:

When the National Labor Relations Board issued its controversial and far reaching decisions redefining who is a supervisor -- in *Oakwood Healthcare, Inc.*; *Croft Metals, Inc.*, and *Golden Crest Healthcare Center* -- it also identified 46 pending representational cases that implicated similar issues.<sup>1</sup>

The Board remanded those 46 cases back to the Regions with directions for review and rehearing. Regions were also directed to note whether or not newly filed cases raised similar supervisory issues and to code them with "Oakwood Health" in a field provided in the NLRB's CATS case tracking system database. Presumably, too, a number of cases were pending at the Regional level that raised similar issues.

I write to request the names and final disposition of all representational cases pending at, and newly filed since, the time of the *Oakwood*, *Croft* and *Golden Crest* decisions, which raised similar issues, and that you include at least the following information for each specific case:

1. NLRB determination of related cases after *Oakwood*:

- A. Please provide a copy of the original RC petition.
- B. Did the petitioner withdraw the petition after September 29, 2006?
- C. If the petitioner did not withdraw petition, were the parties asked for views on the sufficiency of the record?
- D. Was an Order to Show Cause issued? If so, when?
- E. Was a hearing reopened in this case?
- F. What was the Regional Director's final decision? What was the date of that decision?

<sup>1</sup> Memorandum from Richard A. Siegel, Associate General Counsel to All Regional Directors (October 11, 2006).

*Infused  
for our file  
have been distributed  
to staff*



- G. Was a request for review filed? By which party?
- H. Was a review granted? If so, when?
- I. What was the Board's decision? When was it issued?

2. Status of elections:

- A. For those cases in which an election had occurred prior to September 29, 2006:
  - i. What was the date of the election?
  - ii. Have the ballots been counted? If so, what was the result?
  - iii. Was the election certified?
- B. For those cases in which an election had not yet occurred by September 29, 2006:
  - i. Has an election taken place?
  - ii. If so, what was the date of the election? What was the result?
  - iii. Was the election certified?

3. Unfair Labor Practices:

- A. Were charges alleging unfair labor practices filed by either Party? If so, what were they? Please provide all filings made by accusing parties.
- B. What is the current disposition of each of those charges?
- C. Did the Board invoke its authority to seek injunctive relief under Section 10(j) of the Act? If so, when and as a result of which complaints?
- D. Has the Board issued a decision and order on the charges? If so, please provide a copy of the decision and order?

4. Initial Agreement:

- A. Has an initial bargaining agreement been signed?

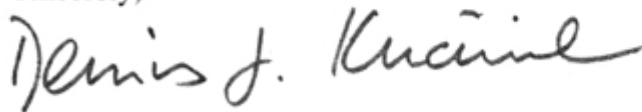
Finally, the Subcommittee requests that you submit this information in electronic form, either on a CD, a DVD, or a flash drive. Please provide these documents no later than 5:00 PM on Friday, February 15, 2008.

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

Mr. Ronald Meisburg  
February 1, 2008  
Page 3

If you have any questions regarding this request, please contact Jaron Bourke, Staff Director, at (202) 225-6427.

Sincerely,

A handwritten signature in black ink that reads "Dennis J. Kucinich". The signature is written in a cursive, flowing style.

Dennis J. Kucinich  
Chairman  
Domestic Policy Subcommittee

cc: Darryl Issa  
Ranking Minority Member

---



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, D.C. 20570  
[www.nlrb.gov](http://www.nlrb.gov)

April 18, 2008

The Honorable Michael B. Enzi  
Ranking Minority Member, Committee  
on Health, Education, Labor and Pensions  
United States Senate  
Washington, DC 20510

Dear Senator Enzi:

I am writing to you in response to the request of Greg Dean, General Counsel of the Minority Staff of the Committee on Health, Education, Labor and Pensions, for information concerning the employment and work assignments of Dennis Walsh in the Office of the General Counsel of the NLRB.

As you know, Mr. Walsh was nominated by President Bush and confirmed by the Senate and served as a member of the Board from December 17, 2002 to December 16, 2004. On April 27, 2005, he was renominated by President Bush to be a Member of the Board. On January 17, 2006, he was given a recess appointment and that appointment expired on December 31, 2007.

Because it was very likely that the President's nomination of Mr. Walsh would be renewed when the Senate returned in January of 2008, I appointed him to a temporary position, not to exceed one year, as an excepted service attorney on my staff. I did so in order to assist him with employment while he awaited renomination and confirmation. President Bush renominated Mr. Walsh on January 25, 2008. That nomination is pending in the Committee.

Mr. Walsh's temporary appointment in the Office of the General Counsel is to the position of Special Assistant to the chief of the Division of Enforcement Litigation in Washington. He is working primarily on legal issues arising in the Appellate and Supreme Court Litigation Branch and the Special Litigation Branch. He is not involved in matters where the General Counsel is acting in his capacity as a prosecutor of cases before the Board.

Among other things, Mr. Walsh is assigned to provide guidance to attorneys working on a matter that I consider of high importance—the preparation of a model brief that we anticipate may be needed to defend before the courts the authority of the current Board, which is comprised of only two Members, to issue valid decisions.

The opportunity for temporary employment that I have given Mr. Walsh is consistent with prior Agency practice with respect to Board Members whose terms have expired and whose renomination by the President for a successive term was expected. Indeed, I myself was given such a temporary appointment by former General Counsel Arthur Rosenfeld after my own recess appointment as a Board Member expired on December 8, 2004, while I was awaiting Senate action on the President's January 2005 nomination of me to serve as a Board Member.

While my Board Member nomination was pending, I served as Special Assistant to the Chief of the Division of Enforcement Litigation—essentially the same position that Mr. Walsh now occupies. I also worked on legal issues arising in the Appellate and Supreme Court Litigation Branch and the Special Litigation Branch, and was not involved in matters where the General Counsel is acting in his capacity as a prosecutor before the Board.

When, in June 2005, the President withdrew his nomination of me to continue as a Board Member and nominated me instead to be General Counsel, I continued to serve in that temporary position until becoming General Counsel pursuant to a recess appointment in January 2006.

Mr. Walsh, who has served as a Board Member for nearly five years pursuant to successive Presidential appointments, has previously been given similar assignments during the gaps between his terms of service as a Board Member. For example, following Mr. Walsh's completion of the December 17, 2002 to December 16, 2004 term to which President Bush had appointed him, he worked as Special Assistant to Board Member Liebman during the period when his renomination was pending and until President Bush's January 17, 2006 recess appointment became effective.

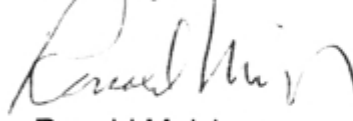
Based on my own experience this practice of providing temporary employment to individuals who having served with honor, are then asked by the President to serve another term, encourages individuals to accept reappointment and is in the best interests of good government and efficient public administration, and is in the best interests of the Agency.

On March 6, 2008, my Deputy General Counsel, John Higgins, expressed a similar viewpoint in a memorandum that he wrote in response to a report by the Counsel to the Inspector General. Copies of both memoranda are enclosed. I concur with Mr. Higgins' conclusion.

The Honorable Michael B. Enzi  
Page Three  
April 18, 2008

If you or the Committee needs any additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Meisburg", written over a light blue horizontal line.

Ronald Meisburg  
General Counsel

Enclosures

cc: The Honorable Edward M. Kennedy  
Chairman, Committee on Health,  
Education, Labor and Pensions  
United States Senate  
Washington, DC 20510

Mr. Greg Dean, General Counsel  
Minority Staff of the Committee on  
Health, Education, Labor and Pensions  
United States Senate  
Washington, DC 20510



**UNITED STATES GOVERNMENT**  
**National Labor Relations Board**



Memorandum

**Date:** March 6, 2008

**To:** Ronald Meisburg  
General Counsel

Wilma B. Liebman  
Member

Peter C. Schaumber  
Member

**From:** John E. Higgins Jr.  
Deputy General Counsel

**Subject:** Issue Alert No. OIG-IA-08-02: Attorney Positions for Former Board Members

I am writing this because I am very troubled by the recommendation made in this Issue Alert against the temporary employment of renominated Presidential appointees while they are awaiting Senate confirmation. I have been with the Agency for over 43 years and during that time have known and worked for many Board Members and General Counsels. I would like to share with you my views on the appointment process as well as some of my experience with it.

First and foremost, almost to a person, the people who take Presidential appointments do so out of a sense of public service and usually at great financial cost to themselves. Most were making more money in the private sector and they accept these positions knowing that they will take a cut in pay, that they will make less money than the Senior Executives working for them and that post employment restrictions may have adverse effects on their practice of law.

Second, they subject themselves to public scrutiny of their finances so that anyone who wants to know the details of their personal finances can easily obtain this information.

Finally, if they decide they would like to continue to serve after their term ends, they must wait, often to the last minute or well beyond it, to find out whether or not they will be renominated and if so, whether they will be confirmed.

Because of these hardships, the government, in my view, should not be reluctant to ease renomination burdens where possible. But because most of the hardships I have mentioned are statutory, there is really very little that an Agency can do to lighten

the burden save to permit incumbent Presidential appointees to make temporary employment opportunities available to a Presidential appointee who has been, or who reasonably expects to be, renominated when his/her term ends and who would otherwise find it difficult if not impossible to find temporary professional opportunities in the private sector.

Over the 43 years I have been with the Agency, I have observed Members and General Counsels graciously assist each other when expiring terms and delayed reappointments raised the specter of temporary unemployment for an individual who the President had decided should to serve another term. That assistance came in the form of temporary appointments. I know for example, that former Member Fanning hired former Member Jenkins at least once<sup>1</sup> and that there have been other situations since.

Many Presidential appointees are not independently wealthy and I doubt can last very long without a paycheck. For those who are wealthy of course, a period of unemployment may be feasible. A policy of no temporary appointments means that only they, the wealthy, could chance the reappointment process. The less wealthy would have to decline reappointment or perhaps sign up for Unemployment Compensation. There may be other ways for people of moderate means to deal with delays in the reappointment process but short of refinancing their homes, I can't think of any.

The Issue Alert suggests that a temporary appointment implicates the merit system, creates the appearance of conflict of interest and is inconsistent with our efforts to conserve resources. I disagree.

These are temporary appointments and everyone knows that they are not "burrowing." Consequently they do not compromise the credibility or the integrity of the merit system. Indeed, I doubt we have any applicants for temporary appointments. And if perchance we do, I cannot think of any applicant who is more qualified than a former General Counsel or Board Member. Moreover, because these appointments are made by peers viz, sitting Presidential appointees, I do not believe that there is any interest that is conflicted by these kinds of appointments. In short, there is no merit system issue, or conflict of interest problem, real or apparent, in these appointments.

And finally, these appointments are the cost of good government. Sometimes the White House and/or the Senate have more important things to worry about than an NLRB reappointment. So the reappointment process gets delayed and when it does, it may occasion a cost to the government. I have never heard of a complaint from Congress about the costs of a temporary appointment in the reappointment circumstances we have here at the NLRB. That is no doubt because the Senate does not see these appointments as in anyway preempting the confirmation process. I think that this silence indicates a Congressional belief that the important point is not the small amount of money involved in a temporary appointment; it is rather that renominated individuals are the choices of the President of the United States, men and women who have served honorably and who deserve to be treated as such.

<sup>1</sup> There are no records to confirm this. My recollection is that it happened more than once during the four renominations of John Fanning and the three renominations of Howard Jenkins. However, I can find no records of any of the appointments and a long time Fanning staffer could only remember one incident that was occasioned by a payroll conflict.

As a former Inspector General and as a senior career employee, I urge the Board and General Counsel to reject the recommendation of this Issue Alert.

J.E.H.

cc: Les Heltzer  
David Berry  
William Cowen



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

November 20, 2009

The Honorable George Miller, Chairman  
Committee on Education and Labor  
United States House of Representatives  
Washington, DC 20515-6100

Re: SEIU/NUHW Cases

Dear Mr. Chairman:

This is to acknowledge your letter dated November 17, 2009, requesting an update regarding the NLRB cases growing out of the dispute between Service Employees International Union-United Healthcare Workers-West and National Union of Healthcare Workers. I have asked my staff to prepare an update which I will provide in the very near future.

In the meantime, if I can be of any further assistance to you in this or any other matter, please do not hesitate to contact me at (202) 273-3700. For ease of reference, your correspondence is being returned.

Sincerely,

  
Ronald Meisburg  
General Counsel

Enclosure



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, D.C. 20570  
[www.nlrb.gov](http://www.nlrb.gov)

September 1, 2009

The Honorable Edolphus Towns  
Chairman, Committee on Oversight  
and Government Reform  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

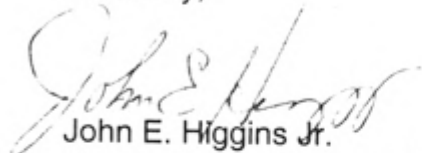
Dear Mr. Chairman:

I am writing you in connection with the August 21, 2009 request by Congressman Issa for certain NLRB representation case data (copy enclosed).

The material has been provided to Mr. Kaplan of the Minority staff and I am enclosing a copy of this same material for the use of your staff. I believe it would be helpful to your staff if I met with them to explain the data on the enclosed disc.

I can be reached at 202-273-3700.

Sincerely,

  
John E. Higgins Jr.  
Deputy General Counsel

Enclosures

cc: Wilma Liebman, Chairman  
Les Heltzer, Executive Secretary

ONE HUNDRED ELEVENTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5051  
Minority (202) 225-5074

August 21, 2009

The Honorable Wilma B. Liebman  
Chairman of the National Labor Relations Board  
National Labor Relations Board  
1099 14<sup>th</sup> St. N.W.  
Washington, D.C. 20570-0001

Dear Chairman Liebman:

The Committee is investigating trends in unionization over the last 10 years. To facilitate this investigation, please provide the following information for each certification and decertification election, whether successful or not, performed between January 1, 2000 and present in an excel spreadsheet no later than September 4, 2009.

1. List of every certification and decertification election held between January 1, 2000 and present.
2. Name and other identifying information (including address and affiliation) for the union or unions involved in each certification and decertification election.
3. Name and other identifying information (including address of election and employee identification number) for the employer involved in each certification and decertification election.
4. Location of each election.
5. Location of the election unit.
6. Job classification of employees included in election unit.
7. Date of election.
8. Type of election – decertification, certification, etc.
9. Size of unit.



Honorable Wilma B. Liebman  
August 21, 2009  
Page 2

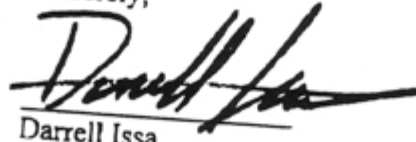
10. Election results.

11. Identify those elections that have been rerun.

12. Identify those elections that included an unfair labor practice charge and identify the unfair labor practice charge.

Thank you for your cooperation in this matter. If you have any questions regarding this request, please contact Marvin Kaplan of the Committee staff at (202) 225-5074.

Sincerely,



Darrell Issa  
Ranking Member

cc: The Honorable Edolphus Towns, Chairman

ONE HUNDRED ELEVENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5051  
Minority (202) 225-5074

August 21, 2009

The Honorable Wilma B. Liebman  
Chairman of the National Labor Relations Board  
National Labor Relations Board  
1099 14<sup>th</sup> St. N.W.  
Washington, D.C. 20570-0001

Dear Chairman Liebman:

The Committee is investigating trends in unionization over the last 10 years. To facilitate this investigation, please provide the following information for each certification and decertification election, whether successful or not, performed between January 1, 2000 and present in an excel spreadsheet no later than September 4, 2009.

1. List of every certification and decertification election held between January 1, 2000 and present.
2. Name and other identifying information (including address and affiliation) for the union or unions involved in each certification and decertification election.
3. Name and other identifying information (including address of election and employee identification number) for the employer involved in each certification and decertification election.
4. Location of each election.
5. Location of the election unit.
6. Job classification of employees included in election unit.
7. Date of election.
8. Type of election – decertification, certification, etc.
9. Size of unit.

Honorable Wilma B. Liebman  
August 21, 2009  
Page 2

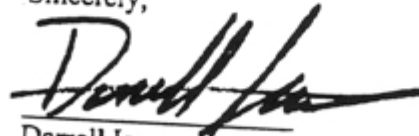
10. Election results.

11. Identify those elections that have been rerun.

12. Identify those elections that included an unfair labor practice charge and identify the unfair labor practice charge.

Thank you for your cooperation in this matter. If you have any questions regarding this request, please contact Marvin Kaplan of the Committee staff at (202) 225-5074.

Sincerely,



Darrell Issa  
Ranking Member

cc: The Honorable Edolphus Towns, Chairman



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

May 14, 2009

The Honorable George Miller  
Chairman, Committee on Education and Labor  
House of Representatives  
2121 Rayburn House Office Building  
Washington, DC 20515

The Honorable Barbara Lee  
House of Representatives  
2444 Rayburn House Office Building  
Washington, DC 20515

The Honorable Lynn Woolsey  
House of Representatives  
2263 Rayburn House Office Building  
Washington, DC 20515

Re: SEIU/NUHW Cases

Dear Chairman Miller and Representatives Lee and Woolsey:

This is in further reply to your recent letter concerning the cases currently pending in the National Labor Relations Board's Regional Offices in San Francisco, Los Angeles, and Oakland, arising from the dispute between the Service Employees International Union (SEIU) and its affiliate United Healthcare Workers-West (UHW) and the National Union of Healthcare Workers (NUHW). As I noted in my initial reply, dated April 9, 2009, I asked my staff to prepare a more comprehensive status report. This letter constitutes that report.

These cases have their genesis in the dispute between the former leadership of UHW and SEIU's international leadership. UHW is the recognized collective-bargaining representative of approximately 150,000 public and private sector health care workers throughout California, working in such settings as acute care hospitals, nursing homes, home health care, assisted living facilities, and elsewhere.

The Honorable George Miller  
The Honorable Barbara Lee  
The Honorable Lynn Woolsey  
Page Two

On January 27, 2009, SEIU's board imposed a trusteeship on UHWW. An immediate consequence of the trusteeship was that UHWW's principal officers were removed from any authority over UHWW business. Shortly thereafter, approximately 100 UHWW officers and staff members resigned and affiliated themselves with a newly established labor organization, the National Union of Healthcare Workers (NUHW).

On February 3, NUHW began seeking elections under Section 9 of the National Labor Relations Act (NLRA or Act), in order to be certified as the exclusive collective-bargaining representative of approximately 100,000 employees of private-sector health care employers covered by the Act, throughout California, who are currently represented by UHWW. (The Act does not cover public-sector employees and thus the NLRB has no jurisdiction over the approximately 50,000 home health care workers employed by public-sector agencies in California.) NUHW has filed petitions for elections in all four NLRB California Regional Offices, with the majority of those petitions pending in the San Francisco and Oakland Regional Offices. Approximately 80 petitions have been filed with the NLRB.

Upon the filing of those election petitions, the Regional Offices promptly scheduled pre-election hearings and assigned agents to investigate whether the petitions met the 30 percent support threshold. Shortly thereafter, SEIU filed over 100 unfair labor practice (ULP) charges in the four California Regional Offices, alleging that UHWW, under its pre-trusteeship leadership, engaged in conduct that both violates the NLRA and precludes the holding of a fair election. Recently, SEIU has filed additional charges, naming NUHW and its officers, covering much of the same conduct. Approximately 170 ULP charges in total have been filed by SEIU in this dispute.

As a result of these ULP charges, the Regional Directors having jurisdiction over the cases have applied the NLRB's long-standing "blocking charge" policy to NUHW's election petitions. This policy provides that the NLRB will not process election petitions when alleged ULP conduct would likely interfere with employee free choice. See, e.g., *Overnite Transportation Co.*; 333 NLRB 1392 (2001); *St. Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). Before doing so, however, the Regional Directors sought the views of the parties as to whether the petitions should be blocked. Furthermore, while the decision to block an election petition rests initially with the Regional Director, such action may be reviewed by the Board upon request. To date, NUHW has sought such review in only three cases; as of today, the Board has not ruled on those requests for review.

The Honorable George Miller  
The Honorable Barbara Lee  
The Honorable Lynn Woolsey  
Page Three

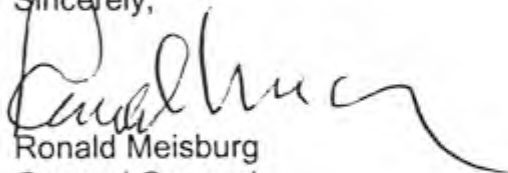
In light of the blocked election petitions, the Regional Directors are keenly aware of the need to act as expeditiously as possible to investigate these ULP charges, and the Agency has devoted significant resources to gathering evidence and conducting the necessary legal research. The Regional Directors, as well as my staff in Washington, have kept all parties apprised of the status and progress of all cases.

In addition, a large number of the bargaining units sought by NUHW's election petitions—at Catholic Healthcare-West (CHW) and Kaiser Permanente (Kaiser)—are covered by collective-bargaining agreements (CBAs) between those employers and UHWW, and thus are subject to the Board's long standing "contract bar" rule. This rule provides that the NLRB will not process an election petition during the term of a collective-bargaining agreement. In the case of CHW, the Regional Director for Region 20, in San Francisco, by order dated March 17, 2009, dismissed the NUHW's petitions, finding that the current CBA between CHW and UHW constitutes a contract that bars an election from taking place, and furthermore, that a schism did not exist within SEIU that would serve as an exception to the contract bar rule. Similarly, in the case of Kaiser, the Regional Director for Region 32, in Oakland, by Order dated April 7, 2009, dismissed the petitions in those cases. Collectively those petitions cover some 65,000 of the 100,000 employees that are currently represented by UHW covered by the Act. A copy of each of the orders is enclosed. NUHW has asked the Board to review both of those orders, and those matters are, therefore, currently pending before the Board.

As was the case when I first wrote, these matters continue to have my close attention and that of my staff in Washington and in the affected Regions. We will continue to deal with them as expeditiously as possible.

Thank you for your inquiry. Please do not hesitate to contact me should you have any further questions or concerns.

Sincerely,



Ronald Meisburg  
General Counsel

Enclosures: Orders in CHW and Kaiser

cc: Chairman Liebman  
Ranking Member





## NATIONAL LABOR RELATIONS BOARD

### Region 20

901 Market Street, Suite 400  
San Francisco, California 94103-1735

Telephone: 415/356-5130

FAX: 415/356-5156

Website: [www.nlrb.gov](http://www.nlrb.gov)

March 17, 2009

Fred Seavey  
National Union of Healthcare Workers  
519 17<sup>th</sup> Street  
Oakland, CA 94612

**Re:** Catholic Healthcare West  
**Case:** 20-RC-18222

Dear Mr. Seavey:

On February 13, 2009, I issued an Order to Show Cause as to why I should not dismiss the instant Petition on the basis that the successor collective-bargaining agreement precludes conducting an election in this matter. Petitioner National Union of Healthcare Workers (also referred to as NUHW), Intervenor/Incumbent Union SEIU<sup>1</sup> United Healthcare Workers-West (UHW or Local) and Catholic Healthcare West (Employer) all filed responses containing numerous exhibits, including several declarations from Petitioner and one declaration from the Employer. After careful consideration of the submissions and other evidence, I have decided to dismiss the Petition in this matter for the reasons that follow:

#### Background regarding the Collective-Bargaining Agreement:

After almost nine months of bargaining over terms for a successor collective-bargaining agreement to replace their contract that by its terms expired on April 30, 2008, UHW and the Employer reached agreement on October 12, 2008. The agreement is encompassed in a document entitled, "CHW/SEIU-UHW Master Negotiations Comprehensive Contract Settlement Proposal October 12, 2008" (herein called the CBA). The CBA includes the cover page and 68 additional pages,<sup>2</sup> and was signed by 67 members of the UHW's bargaining committee and three representatives of the Employer who "unanimously recommend this agreement for settlement." Each page of the CBA was initialed by at least one lead negotiator from both UHW and the Employer. The cover page states, in relevant part,

<sup>1</sup> SEIU refers to Service Employees International Union, to which I also refer as the International.

<sup>2</sup> The handwritten number on the top-right corner of each page of the CBA rises sequentially through page 38, at which point it reverts to 34 and again rises sequentially through 63. Thus, CBA inadvertently contains two pages bearing page numbers 34-38.

The Parties agree to the most recent version of the following CHW Proposals:

- b. Retirement Re-opener Proposal
- n. Additional Economic Commitment Side Letter

Proposals or other items not expressly agreed to shall revert to the status quo. To the extent either Party has any proposal not already agreed to or referenced herein, that proposal is hereby withdrawn.

This agreement represents the full and final agreement between the Parties.

Final agreement is subject to ratification by the SEIU-UHW membership. The SEIU-UHW Bargaining Committee agrees to fully support and recommend ratification of this agreement.

The CBA states that it is effective from May 1, 2008, until April 30, 2012, and covers a bargaining unit that consists of some 14,000 employees at approximately thirty facilities across the State of California. The facilities covered by the CBA match the facilities covered by the instant Petition. The CBA carries forward numerous provisions of the predecessor agreement, while providing new language for wage increases; a supplemental unemployment fund; continued participation in the UHW and Employer Joint Education Fund; new health insurance language; increased paid time for shop stewards; the creation of six full-time paid union positions; bereavement leave benefits; revisions to leave policies; revisions to the grievance procedure; new change of ownership language; language providing for paid meals for dietary workers; new recognition language; new language regarding seniority and job vacancies; new language on discipline and discharge; and side letters to address facility-specific matters.

The CBA also includes a "retirement reopener" committing the parties to meet within thirty days of ratification of the CBA to consider alternatives to the current plan and providing for review by their respective legal or benefits representatives in advance of finalization of the actual language of the retirement reopener. The parties also agreed to an Additional Economic Commitment Side Letter that states, in its entirety:

1. The Parties agree that there remain unspent monies relative to the Economic Commitment made by the Employer related to the 2008-2012 contract bargaining.
2. While the Parties are in dispute regarding the exact amount of the unspent monies, they wish to resolve this dispute in the interest of reaching an overall contract settlement.
3. As such, the parties hereby agree that the amount of the unspent monies is \$2.3 million dollars.

4. The Parties agree to negotiate over how the money shall be spent to improve collateral pay issues.

BNA reported in its Daily Labor Report that UHW advised it on October 31, 2008, that its membership had voted overwhelmingly to ratify the CBA. An article in the October 31, 2008, edition of San Francisco Business Times reported that then UHW President Sal Rosselli had described the agreement as "historic" and announced that UHW intended to make this agreement a pattern for negotiations with smaller hospital systems. Various UHW press releases also heralded the agreement as "landmark." No press release or news article that I have reviewed on the subject of these developments in October 2008 characterizes the CBA as an interim, tentative or temporary agreement.

Following ratification, the Employer implemented the terms of the CBA. It calculated and implemented retroactive wage increases for the 14,000 bargaining unit employees back to the effective date of May 2008 (approximately \$7.2 million). It then made a second round of wage increases in 2008 as called for by the CBA. The Employer remitted union dues to UHW and processed grievances that UHW filed.

One of UHW's negotiator's, Brian McNamara, contacted the Employer's lead negotiator, Judy Coffin, to set up a meeting over the allocation of the amount of money agreed upon under the "Additional Economic Commitment" side letter. Coffin declared that, during their phone conversation, she told McNamara that she was concerned about the rumors that UHW thought that the Employer was "jamming" it and told McNamara that, if he had a spreadsheet documenting how, in UHW's opinion, the Employer had not lived up to its commitment with respect to the 24%,<sup>3</sup> she would pass it on to the Employer's leadership to see if it wanted to add anything to the "bucket" already agreed upon. According to Coffin, McNamara said that he would get back to her.

In compliance with the retirement reopener,<sup>4</sup> UHW staff person Freja Nelson notified Coffin, by email dated November 21, 2008, that she wished to schedule a meeting within the prescribed thirty-day period following the ratification—before November 30, 2008—as called for by the CBA. Due to the imminent Thanksgiving holiday, they agreed to delay the re-opener meeting until after that holiday.

Nelson emailed Coffin early in December to suggest that each side gather their "costers" for a pre-meeting to the retirement re-opener meeting. Coffin called her back in a few days to ask why the "costers" needed to be involved in view of the fact that the CBA established that the amount of money involved was \$2.3 million. According to

---

<sup>3</sup> During the 2008 negotiations, UHW and the Employer agreed on a total "bucket" of money, equal to 24% of payroll costs, from which all new compensation cost items would be drawn.

<sup>4</sup> According to Coffin, negotiating the retirement plan provided for by the earlier agreement had also been difficult. For some time, UHW claimed that the retirement language contained in the predecessor agreement required that the retirement benefit be based on "final average pay" and not a "snapshot" amount based on the employee's 2005 rate of pay. Just as in the case of the remaining amount in the "bucket", Coffin was adamant that the parties would not leave the bargaining table with unresolved economic parameters. UHW relented, and the language contained in the CBA represents a final settlement of these issues.

Coffin, Nelson told her UHW viewed that number as a floor or minimum. Coffin objected and pointed out that the language in the Additional Economic Commitment side letter was clear, the amount was the result of a compromise in the face of disagreement and doubts about the exact amount, and the parties had explicitly agreed to the amount in order to reach a final agreement without incurring the delay that would have resulted from further examination of the "bucket" by their respective "costers." Coffin said they had a deal and she was not bargaining further over the amount.

Coffin again spoke to McNamara on December 11, 2008. According to Coffin, McNamara said that he thought that he and Coffin had an agreement that the \$2.3 million was a floor and that the Employer would consider more. Coffin told him that she had volunteered only to take back to the Employer's leadership any information McNamara provided to lend credence that the Employer, contrary to its own belief, had not met or exceeded its 24% commitment. Coffin contends that she indicated that the parties nevertheless had a firm agreement as to that amount, and that then-recent economic developments made it less likely that the Employer would be willing to add more. She allowed only that, for the sake of the relationship, if the Union could conclusively prove to the Employer that the "unspent" amount left in the "bucket" was more than \$2.3 million, she would take that data back to her principals. She reiterated that she was not making any commitments and was not going to bargain over this issue. Coffin says McNamara admitted he understood that they had a "legal deal".

In a letter dated January 12, 2009, that McNamara sent to Coffin to memorialize their conversation, and in his declaration, McNamara paints a picture distinct from Coffin's. He described the CBA as tentative, needing further negotiations to resolve important outstanding issues such as job matching with wage scales, language for the retirement re-opener, and language on local provisions applicable to various facilities that had become part of the bargaining unit since the predecessor agreement was signed. He also proposed new language for the retirement re-opener.

Coffin disputed McNamara's contentions. She explained that UHW and the Employer had dealt with all known "job matches" in the CBA, and the Employer had no intention of adding additional matches to the CBA. She acknowledged that, as with the predecessor contract, wage issues might crop up in the course of putting together the written final agreement. She also acknowledged that it was true that certain local addendums had not yet been fully incorporated into the CBA. She noted, however, that this process merely entailed review of local provisions to determine whether any of them conflicted with the CBA, in which case the CBA would control. The parties had encountered similar issues in 2004 and were able to resolve them successfully after implementation of the finalized predecessor contract. Coffin asserted that the declaration of Morgan Gay, submitted by Petitioner with its response, is incorrect in its claim that there was no contract in place while those adjustments were negotiated in 2004. Lastly, Coffin posited that McNamara's letter is inaccurate in asserting that the CBA left open the issue related to the actual language of the retirement re-opener. Coffin argued that the parties had agreed to have legal and benefit expert review solely to ensure accurate phrasing of the intended agreement—not to change substantive



content. McNamara's proposed language deviated significantly from the CBA language and could not have derived from mere legal review, according to Coffin.

On January 23, 2009, Coffin called Judy Scott, General Counsel of SEIU, to find out whether the International was going to put the UHW under trusteeship. Scott returned the call on January 26, 2009, and told Coffin that she (Scott) had heard that the leadership of UHW was claiming that the CBA was not a final agreement. Coffin informed her that there was no question that the agreement was settled on October 12, 2008, and that the CBA constituted a final contract. Scott asked if it had been fully implemented and Coffin claims to have assured her that it had.

UHW and the Employer met on January 26, 2009, to negotiate changes to the retirement plan consistent with the re-opener in the CBA. Coffin stated that it was not a productive meeting because UHW did not stay within the terms of the re-opener and, instead, again raised UHW's position that the plan should be based on "final average pay," a more expensive base for calculating retirement benefits. Coffin told UHW that the Employer was not going to re-visit that issue and that it would stick with the language of the re-opener which provided that \$2 million would be added to the actuarial expense of the existing plan, an amount insufficient to fund the "final average pay" basis. McNamara continued to argue UHW's position and suggested another meeting. Coffin responded that she saw no point unless UHW was going to work with the Employer. She told him that, if he wanted to schedule another meeting, they should also discuss the collateral pay (bucket) issue. They tentatively discussed a date of February 9, 2009, for their next meeting. Events intervened prior to that date.

On January 27, 2009, Scott informed Coffin that SEIU had just placed UHW under trusteeship. She told Coffin that Hal Ruddick, a deputy trustee, had been assigned to handle matters related to the Employer. Coffin then arranged with Ruddick to have a conference call the next morning with all the principals. During that call, Coffin again stated that UHW and the Employer had reached a final agreement, although as they had done in the past, they had left a number of details for clean-up at some point. Mike Hunter, attorney for Ruddick, suggested that, out of an abundance of caution, UHW wanted to have the parties enter into a simple document recording that there was an agreement. Later on January 28, 2009, both sides signed a document entitled "Settlement Agreement."<sup>5</sup> The one-page document incorporates the CBA and states that the settlement agreement constitutes a full and complete collective-bargaining agreement between the parties. On February 5, 2009, NUHW filed the Petition in this matter.

#### Analysis of the Collective-Bargaining Agreement:

The Board set forth the basic requirements for application of the contract bar doctrine in *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). Petitioner appears to contest the contract bar determination on the asserted bases that the agreement is temporary,

---

<sup>5</sup> Eliseo Medina, Trustee, signed for UHW and Ernest Urquhart executed the document on behalf of the Employer.

or not final and complete. Petitioner then argues that even assuming that the agreement would otherwise constitute a bar, a schism exists within SEIU which, pursuant to the precedent of *Hershey Chocolate Corp.*, 121 NLRB 901 (1958), disqualifies the agreement from barring an election.

*Duration, Finality and Completeness:*

The CBA is a written, multi-year agreement effective by its terms from May 1, 2008 (retroactively), until April 30, 2012. UHW and the Employer executed the agreement almost three months before NUHW filed the instant Petition. The CBA consists of a series of terms that were initially tentatively agreed upon but that UHW and the Employer adopted as final and binding on October 12, 2008, pending ratification. UHW announced on October 31, 2008, that its membership had in fact ratified the agreement.

The document that embodies the agreement between UHW and the Employer is not yet a "cleaned-up" formal agreement, but under Board law it need not be. In *Gaylord Broadcasting Co.*, 250 NLRB 198, 199 (1980), the Board found a contract bar existed when both parties initialed each page of a document that covered "substantial terms and conditions of employment," "was intended by the parties to be a final and binding agreement," had been ratified by unit employees and was implemented by the Employer. Although the parties in *Gaylord* made some changes to the provisions of the document after initialing them, and in fact did not schedule the "formal execution" of their contract for almost ten months, the Board disagreed with the employer's argument that the initialed document lacked "sufficient formality for contract bar purposes" because it purportedly was an "unsigned, tentative draft agreement which was later substantially revised by the parties." *Id.* at 199. The Board concluded that the requirements of *Appalachian Shale* had been satisfied because "the parties have initialed an agreement which sets forth substantial terms sufficient to stabilize the bargaining relationship, therefore barring the processing of a decertification petition." Indeed, the Board has held that informal documents laying out substantial terms and conditions of employment may serve as a bar, so long as those informal documents are signed. *St. Mary's Hospital*, 317 NLRB 89, 90 (1995). In quite different circumstances, the Board found that there was no contract bar when the parties had no document that adequately identified the contract terms representing their full agreement, even though they had reached tentative agreement on discrete items. *Seton Medical Center*, 317 NLRB 87 (1995). In the instant case, the parties assembled a set of documents containing all of the tentative agreements, attached a detailed cover page which listed and incorporated by reference the tentative agreements and the parties' expired contract (to the extent it had not been revised), had everyone present sign their names (three pages worth of UHW signatures), consecutively (or close to it) numbered and initialed each page, and assembled the entire package into one complete and self-contained document. The facts of this case fall squarely within the principles established by *Appalachian Shale*, *Gaylord Broadcasting*, *St. Mary's*, and *Seton Medical Center*, fully satisfying the first requirement for contract bar.



As noted above, by its terms the CBA carries forward numerous provisions from the predecessor agreement, while providing for: wage increases; a supplemental unemployment fund; continued participation in the UHW and Employer Joint Education Fund; new health insurance language; increased paid time for shop stewards; creation of six full-time paid union positions; bereavement leave benefits; revisions to leave policies; revisions to the grievance procedure; new change of ownership language; language providing for paid meals for dietary workers; new recognition language; new language regarding seniority and job vacancies; new language on discipline and discharge; and various side letters to address facility-specific matters. Between these new terms and incorporation of the terms of the predecessor contract in provisions that had not changed, the CBA is comprehensive. In any event, however, the Board "does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar." It thus found a valid contract bar when the "parties agreed only in general terms to a union-security clause and dues check-off provision, leaving the language of those provisions to be worked out at a later date." *Farrel Rochester Division of USM Corporation*, 256 NLRB 996, 1000 at note 18 (1981) (signed agreement "intended to be final and binding" sufficient to stabilize bargaining relationship and bar petition despite subsequent negotiations over implementation of one provision); see also *Spartan Aircraft Co.*, 98 NLRB 73 (1952) (finding contract bar when agreement was "so complete as to substantially stabilize labor relations between the parties, even though it leaves the wage provision for future negotiations").

As they had in the past, UHW and the Employer agreed to leave some issues unresolved but, in the overall scheme, these items appear to qualify essentially as relatively insignificant housekeeping matters. The parties have a past practice of negotiating in this manner and there have been past delays in assembling the final document and even "further negotiations" over outstanding items. There is no evidence that, in these circumstances in the past, UHW claimed that the contract was not a final agreement. The CBA contains a retirement re-opener and Additional Economic Commitment side letter that set forth the manner in which the parties are to proceed regarding both matters. In a similar context, when a contract provided "that, within 90 days from the date of signing, the Company and the Union will have concluded an agreement on article 30 to include any changes deemed appropriate in the seniority article and to establish a craft training program," the Board did not regard the "prospective bargaining and consequent uncertainty" of this provision "as sufficient to remove the agreement as a contract bar". *Thiokol Corp.*, 215 NLRB 908 (1974).

Given the size of the bargaining unit, the number of separate facilities, and the fact that UHW and the Employer were integrating facilities into the bargaining unit for the first time, the end result of their negotiations was a bit complicated. The parties to the contract left some matters that might be modified or tidied up within certain guidelines. This fact, however, does not detract from the sufficiency, under the precedent noted above, of the CBA to bar an election.

Petitioner, through declarations by McNamara, Gay, Borsos and Kahmar, relies on parol evidence to attempt to undercut the documents which, on their face, establish the

existence of the CBA. I addressed above certain issues that NUHW would raise in attempting to cast doubt on the status of the CBA, and the Employer's rebuttal to a number of NUHW's assertions about post-agreement communications. In the final analysis, however, these disputes are of no matter in evaluating the status of the CBA and, therefore, they need not be resolved in this proceeding. In the position statements that UHW and the Employer submitted in response to the OSC, they rely on the plain and explicit language of the CBA to establish that the contract is final and contains sufficiently substantial terms and conditions of employment. This approach is consistent with Board law, which consistently holds that parol evidence is inadmissible in assessing whether an asserted contract will act as a bar. The Board has affirmed that "for contract bar purposes, the documentary evidence, on its face, must be sufficient to establish the terms of the agreement and must leave no doubt that it represents an offer and acceptance of those terms." *Waste Management of Maryland, Inc.*, 338 NLRB 1002, 1003 (2003) (no bar to decertification petition where "exact terms" of alleged agreement could not be ascertained from parties' exchange of letters"). In the context of representation cases, "the Board has consistently limited its inquiring to the four corners of the document or documents alleged to bar an election and has excluded the consideration of extrinsic evidence." *Id.*, at 1003; see also *Loree Footwear Corp.*, 197 NLRB 360 (1972) ("the Board has consistently taken the position, which we here affirm, that the legality of a contract asserted as a bar is to be determined in representation proceedings from the face of the contract itself and that extrinsic evidence will not be admitted in a representation proceeding to establish the unlawful nature of such a contract"); *Jet-Pak Corp.*, 231 552 (1977) (in determining whether a contract serves as a bar to an election, we are permitted only to examine the terms of the contract as they appear within the four corners of the instrument itself").

The document that UHW and the Employer signed on October 12, 2008, states on its face that "this agreement represents the full and final agreement between the parties." The CBA was initialed by the negotiators for each side and signed as in *Gaylord*. It expressly covers wages and other substantial terms and conditions of employment. The CBA calls for further negotiations between the parties to the contract on collateral pay issues and provides for a retirement re-opener, but it more than sufficiently stabilizes the bargaining relationship between the parties for the life of the agreement. UHW members ratified the CBA and its terms were implemented thereafter. Both UHW and the Employer have operated under the terms of the CBA. For the reasons set forth above, the CBA constitutes a contract that, other things being equal, would bar an election in this matter.

#### *Background regarding Schism:*

Petitioner argues that, even if the agreement between UHW and the Employer is permanent and final, it would not bar an election because of a schism within SEIU.

UHW is a local that represents approximately 140,000 healthcare workers in California. Of these employees, approximately 78,000 work in hospitals. SEIU is one of the largest

labor organizations in the United States, with a total membership of about two million spread across a number of industries.

SEIU claims that in March 2008, it received information that UHW had authorized the diversion of millions of dollars into nonprofit organization dubbed "UHW Patient Education Fund" designed in a manner that would exempt it from oversight by SEIU, the United States Department of Labor, and UHW members. Initially, SEIU sought to investigate the matter through information requests. In April 2008, SEIU sued UHW on behalf of UHW's members. UHW dissolved the nonprofit organization and restored to its coffers the funds that remained unspent. In August 2008, pursuant to his authority under the SEIU Constitution and Bylaws, SEIU President Andrew L. Stern appointed an agent to examine UHW's books and financial records. About the same time, Stern appointed two personal representatives to monitor UHW's conduct in such matters as contract administration and negotiations. As a result of these events, SEIU concluded that UHW had engaged in misconduct that included: the establishment of the nonprofit organization and transfer of millions of dollars thereto; misrepresentations to SEIU and to UHW's membership; improper diversion of \$500,000 into an attorney trust account; and the wrongful appropriation and misuse of a database that belonged to the International. On August 25, 2008, SEIU notified UHW that a hearing would occur as to whether a trusteeship should be imposed on the basis of these and other allegations.

SEIU appointed former U.S. Secretary of Labor Ray Marshall to serve as the hearing officer and charged him to prepare a report and recommendation as to whether a trustee should be appointed to take full charge and control of the affairs of UHW. Over six days in September and November 2008, Marshall conducted an evidentiary hearing during which both SEIU and the UHW were represented by counsel and accorded due process.

By letter dated January 9, 2009, UHW's then-leaders claimed to Stern that they had received petitions and letters from members at dozens of UHW-represented hospitals, nursing homes, clinics and home health care units requesting that they ask SEIU to schedule a vote as soon as possible to determine whether UHW members wished to disaffiliate from SEIU. With this request UHW did not submit any of the petitions and letters to which it alluded in its letter. Earlier that same day, SEIU's Executive Board (IEB) voted to remove represented home care and nursing home employees from three different California SEIU locals, including UHW, in order to combine them into a single statewide local of approximately 240,000 employees.<sup>6</sup>

On January 21, 2009, Marshall issued his report and recommendations, finding that the leaders of UHW had engaged in financial malpractice and undermined the democratic procedures of the union through the creation of a sham educational entity,

---

<sup>6</sup> Starting as early as 2000, SEIU had pursued a policy of placing all represented employees from the same industry into a single local union in each state. The membership had approved the policy at a convention and, after a hearing in 2008, former Board Acting General Counsel Leonard Page endorsed this program for California. UHW represented approximately 65,000 of such employees, and its officers had consistently objected to this proposal and vowed to fight its implementation.



and had attempted to transfer up to \$6,000,000 from UHW into the coffers of this entity. Marshall found that he was "prevented from gaining more knowledge about [the education entity's] real purposes by [his] limited power to penetrate [the] shield erected by [UHW's officials'] perjury and attorney-client privilege claims." Marshall also found that UHW officials purposefully hid from SEIU the transfer of \$500,000 to a law firm trust account and misappropriated SEIU's convention database. UHW had argued before Marshall that SEIU initiated the trusteeship proceedings to retaliate against UHW officials for their criticisms against SEIU policies, but Marshall dismissed these arguments as unfounded. He also concluded that the response to the allegations by UHW's officers gave SEIU's leaders reason "to question whether the UHW-W would ever deal forthrightly in their (sic) communication with the International Union."

After reviewing the arguments and evidence and reaching findings of fact, Marshall held that the misconduct engaged in by UHW officials constituted financial malpractice and undermined democratic procedures, therefore establishing adequate grounds for trusteeship. Marshall stated that "no democratic labor organization can permit local unions to nullify international decisions reached through the democratic processes specified in their Constitution and Bylaws." Although he found adequate grounds for implementation of a trusteeship, rather than recommend an immediate trusteeship at that time, Marshall recommended that the IEB—which had been charged by President Stern with deciding how and whether to act on Marshall's Report—first give UHW's officials an opportunity to abide by and cooperate with SEIU's recent decisions regarding long-term care jurisdiction in the State of California. Marshall concluded that the improper actions of the officials of the UHW that were the subject of the trusteeship hearing were "symptoms" of the larger problem of UHW's resistance to the long-term care jurisdiction program of the International. Marshall recommended that the officials of UHW be given five days to confirm in writing their intent to cooperate fully with the implementation of the SEIU's decisions regarding long-term care jurisdiction. Marshall recommended that if UHW failed to do so within the allotted time, SEIU impose the trusteeship.

On January 22, 2009, SEIU's IEB reviewed and unanimously adopted the recommendations of the Marshall Report. The IEB also made it clear that Stern had the authority to impose a trusteeship on the basis of Secretary Marshall's findings if he concluded that UHW had failed to comply fully with the conditions set forth in Marshall's adopted Report. Five days later, UHW officials made clear their intention to resist the implementation of IEB's jurisdiction decision on long-term care jurisdiction in California.

On January 27, 2009, SEIU International President Stern placed UHW under trusteeship for its failure, among other things, to commit to the conditions adopted from the Marshall Report. As a separate basis for implementation of emergency trusteeship, Stern stated that he had reason to believe that UHW's leaders were fostering and facilitating, or at a minimum failing to take affirmative action to counteract, plans and proposals to decertify UHW bargaining units, deauthorize dues deductions, and trigger defections of UHW members to new rival unions, thereby immediately putting at serious risk the stability of collective-bargaining relationships for the affected members and

undermining the lawful objectives of the International Union. Stern found that these concerns, on their own, were sufficient to warrant the imposition of an emergency trusteeship to safeguard the interests of the members of UHW.

By operation of the January 27, 2009, trusteeship order, all officers of UHW's Executive Board were immediately removed from their positions as officers of the Local. All officers, representatives and employees of UHW were ordered immediately to make available to the appointed trustees and deputy trustees all books, records and other property of the local union. On the afternoon of January 27, 2009, the two appointed trustees and six deputy trustees began to oversee the daily operations and finances of UHW.

The day after the trusteeship was implemented, a large number of former officers and agents of UHW announced that they had established a new union of healthcare workers, referred to as the "National Union of Healthcare Workers" or "NUHW." On February 2, 2009, NUHW began to file petitions with the NLRB seeking elections to decide whether employees wished to displace UHW as their exclusive collective-bargaining representative in numerous UHW bargaining units, or to deauthorize enforcement of the union security clause in other UHW-represented units.

#### *Analysis regarding Schism:*

Many years ago, the Board recognized a "schism" exception to the contract bar doctrine when: (1) there is a basic intraunion conflict, meaning a "conflict over policy *at the highest level of an international union* . . . which results in a disruption of existing intraunion relationships," (emphasis added); (2) affected employees had an "opportunity to exercise their judgment on the merits of the conflict" at an open meeting with due notice regarding the purpose of the meeting; and (3) these events "result[] in confusion unstabilizing the bargaining relationship," in that the employer faces "conflicting claims by the unions involved in the alleged schism." The Board applies these criteria conjunctively; all must be present to find schism. *Hershey Chocolate Corp.*, *supra* at 909.

With regard to the initial criterion, the Board has emphasized that a conflict between a single local and its parent international, no matter how heated and vitriolic, does not present the basic intraunion conflict at the highest level required for the "schism" exception. *Swift & Co.*, 145 NLRB 756, 762 (1963) ("a [mere] disaffiliation movement with [the Local] born out of a policy conflict between that local and its international" does not satisfy the requirements for a schism). Accord, *Georgia Kaolin Company*, 287 NLRB 485, 488 (1987) ("Disaffection among members of a local with action taken by an international does not constitute schism," even when that dissatisfaction involves the events surrounding a convention—the highest governing body of the international); *Yates Industries, Inc.*, 264 NLRB 1237, 1249 (1982) (no schism when there exists "only a disagreement between a local and its international"); *Standard Brands, Inc.*, 214 NLRB 72, 73 (1974) (no schism when "certain members [of a local] were dissatisfied of a proper and legitimate action taken by its international," since that dissatisfaction does

may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlr.gov](http://www.nlr.gov). On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Very truly yours,

*/s/ Joseph P. Norelli*

Joseph P. Norelli  
Regional Director

cc: Judy Coffin  
Catholic Healthcare West  
185 Berry Street, Suite 300  
San Francisco, CA 94107

Gregory McClune  
Foley & Lardner  
One Maritime Plaza, Sixth Floor  
San Francisco, CA 94111

Trustees  
SEIU, United Healthcare Workers-West  
560 Thomas L. Berkley Way  
Oakland, CA 94612

Dan M. Siegel  
Siegel & Yee  
499 14<sup>th</sup> Street, Suite 220  
Oakland, CA 94612

Bruce Harland  
Counsel to UHW  
101 Marina Village Parkway, Ste. 200  
Alameda, CA 94501-1091

Lafe Solomon, Director  
Office of Representation Appeals  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-3419





United States Government

**NATIONAL LABOR RELATIONS BOARD**

**Region 32**

**1301 Clay Street, Suite 300N  
Oakland, CA 94612-5224**

**Telephone: (510) 637-3200  
Fax No: (510) 637-3315**

April 7, 2009

Jonathan Siegel  
National Union of Healthcare Workers  
519 17<sup>th</sup> Street, Suite 560  
Oakland, CA 94612

Re: Kaiser Permanente  
Cases 32-RC-5642; 32-RC-5643; 32-RC-5644; & 32-RC-5645

Dear Mr. Siegel:

On March 10, 2009, I issued an Order to Show Cause as to why I should not dismiss the instant Petitions on the basis that the Memorandum of Agreement signed on September 12, 2008 bars the Petitions that were filed in the above-captioned cases on February 26, 2009. Petitioner National Union of Healthcare Workers (NUHW), Intervenor/Incumbent Union SEIU<sup>1</sup> United Healthcare Workers-West (UHW) and Kaiser Permanente (Employer) all filed responses containing numerous exhibits, including several declarations from Petitioner. After careful consideration of the submissions and other evidence, I have decided to dismiss the Petition in this matter for the reasons that follow:

Background regarding the Collective-Bargaining Agreement:

As set forth in the Order To Show Cause, the administrative investigation has disclosed that in 1995, 26 local labor unions, including the Intervenor, representing a variety of bargaining units of the Employer's employees formed a group called the Coalition of Kaiser Permanente Unions (Coalition). In turn, the Coalition and the Employer created the Labor Management Partnership (LMP) in 1997 to, among other things, facilitate the collective bargaining process. In 2000, the LMP negotiated a National Agreement covering thirty-three bargaining units represented by local unions that the Employer and the Coalition mutually had agreed would participate in the national common issues bargaining process and who, prior to the effective date, agreed to include the National Agreement as an addendum to their respective local collective bargaining agreements.

---

<sup>1</sup> SEIU refers to Service Employees International Union, to which I also refer as the International.

On October 1, 2005, the LMP agreed to a successor National Agreement.<sup>2</sup> Section 3.B. of that Agreement states:

Provisions of local collective bargaining agreements and this Agreement should be interpreted and applied in the manner most consistent with each other and the principles of the Labor Management Partnership. If a conflict exists between specific provisions of a local collective bargaining agreement and this Agreement, the dispute shall be resolved pursuant to the Partnership Agreement Review Process in Section 1.L.2.

If there is a conflict, unless expressly stated otherwise, this Agreement shall supersede the local collective bargaining agreements; however, in cases where local collective bargaining agreements contain explicit terms which provide a superior wage, benefit or condition, or where it is clear that the parties did not intend to eliminate and/or modify the superior wage, benefit or condition of the local collective bargaining agreement, this Agreement shall not be interpreted to deprive the employees of such wage, benefit or condition. It is understood that it is not the intent of the parties to inadvertently enrich or compound wages, fringe benefits or other conditions or to create opportunities for "cherry picking," "double dipping," etc.

Section 3.D. of the Agreement states:

1. The duration of this Agreement is October 1, 2005 through September 30, 2008. It shall automatically renew itself for an additional two year period (October 1, 2008 through September 30, 2010), unless either the Coalition (by its Executive Director) or Kaiser Permanente (by its Vice President for the LMP) gives the other party written Notice of Reopening no later than ninety (90) days and no earlier than one hundred, twenty (120) days prior to October 1, 2008.

2. If either party to this Agreement gives timely Notice of Reopening to the other as set forth in Paragraph D.1., this Agreement and all local agreements that incorporate this Agreement as an addendum ("Relevant Local Agreements") shall be reopened with respect to Across-the-Board wage adjustments and Retiree Medical Benefits only ("Reopener Subjects"). Any and all negotiations conducted pursuant to this reopener shall be conducted at the national level by

---

<sup>2</sup> A copy of the relevant portions of the National Agreement is attached hereto as Exhibit A. The link to the complete National Agreement, the relevant local agreements, and the September 12, 2008 Memorandum of Agreement is <http://www.lmpartnership.org/contracts/agreements/index.html>.

the CIC. There shall be no local negotiations, and no other subjects shall be addressed.

a. If this Agreement is reopened pursuant to Paragraphs D.1. and D.2., above, and the parties reach agreement with respect to the Reopener Subjects before October 1, 2008, this Agreement shall automatically renew itself for an additional two-year period, and any and all agreed upon changes with respect to Reopener Subjects shall be incorporated into this Agreement and the Relevant Local Agreements.

b. If this Agreement is reopened pursuant to Paragraphs D.1. and D.2., above, and no agreement is reached with respect to the Reopener Subjects before October 1, 2008, this Agreement shall automatically renew itself for an additional two-year period on all other existing terms and conditions, provided, however, that the parties may continue to negotiate concerning the Reopener Subjects until such time as agreement is reached on those subjects or negotiations conclude. Any and all changes resulting from such continued negotiations shall be incorporated into this Agreement and the Relevant Local Agreements.

3. This Agreement also affects the duration, renewal and reopening of Relevant Local Agreements as follows:

a. Unless otherwise effective earlier as set forth in paragraph 3.b., below, all Relevant Local Agreements shall be effective as of October 1, 2005 and remain in effect until midnight on September 30, 2008. They shall automatically renew themselves, unless Notice of Reopening is given in accordance with Paragraph D.1. above, for an additional period that depends on their classification under the 2000 National Agreement, as follows:

- GROUP I (local collective bargaining agreements with expiration dates on or before September 30, 2005): The renewed period for Group I agreements will begin October 1, 2008 and expire on the anniversary in 2010 of their original Group I expiration date.

- GROUP II (local collective bargaining agreements with expiration dates between October 1, 2005 and January 31, 2007): The renewed period for Group II agreements will begin October 1, 2008 and extend through January 31, 2012 on the anniversary of their original Group II expiration date. In the event of such automatic renewal, employees

covered by Group II agreements will receive a wage increase on October 1, 2010 of not less than 3% ATB. The 3% may be increased by an escalator method based on the BTG wage philosophy factors recommended to the Common Issues Committee on July 6, 2000. The method will be determined no later than April 1, 2007. The method and its application will be subject to resolution in the review process in Section 1 of this Agreement.

- GROUP III (local collective bargaining agreements with expiration dates on or after February 1, 2007): The renewed period for Group III agreements will begin October 1, 2008 and expire on or after February 1, 2012 on their original Group III expiration date. In the event of such automatic renewal, Group III agreements will be reopened on a staggered basis between October 1, 2010 and April 1, 2011. The actual dates to reopen each Group III agreement will be determined no later than April 1, 2007. Group III reopener settlements will apply up to the extended expiration date of the Relevant Local Agreement or for a new full term if jointly determined in local bargaining.

b. Any Relevant Local Agreement entered into during the 2005 bargaining cycle prior to October 1, 2005 shall be effective as of the date of execution. Provisions of this Agreement incorporated as addenda to such a Relevant Local Agreement shall become effective as of October 1, 2005.

c. If Notice of Reopening is given in accordance with Paragraphs D.1. and D.2., above, the renewal provisions of Paragraphs D.2.a. and D.2.b. shall apply to the Relevant Local Agreements in the same manner as to this Agreement, except that the duration of a renewed Relevant Local Agreement shall be the period designated for its Group as set forth in Paragraph D.3.a., above.

4. All terms of the renewed Agreement shall expire at midnight on September 30, 2010, except for the wages, performance sharing opportunities, and benefits as identified in Section 2 of the Agreement. Those excepted provisions shall continue in effect until the expiration dates of the Relevant Local Agreements.

The administrative investigation has additionally disclosed that the duration or term of agreement provisions of each of the local bargaining agreements, all of which were effective as of October 1, 2005, state:

Case 32-RC-5642

ARTICLE XXXVII – DURATION OF AGREEMENT (SEIU Master Agreement)

Except as otherwise specifically provided, this Agreement shall be effective as of October 1, 2005, and shall continue in effect through the month, day, and year as specified in the National Agreement, Section 3: Scope of The Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.

Either party wishing to change or terminate this Agreement must serve written notice of a desire to amend to the other party at least 90 days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.<sup>3</sup>

Case 32-RC-5643

ARTICLE XXIX – TERM OF AGREEMENT

Except as otherwise specifically provided, this Agreement shall be effective October 01, 2005 and shall continue in effect through the month, day and year specified in the National Agreement, Section 3; Scope of the Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.

Either party wishing to change or terminate the Agreement must serve written notice of a desire to amend to the other party at least 90 days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.

Case 32-RC-5644

ARTICLE XXIX – DURATION OF AGREEMENT

Except as otherwise specifically provided, this Agreement shall be effective as of October 1, 2005, and shall continue in effect through the month, day, and year as specified in the National Agreement, Section 3: Scope of The Agreement, D. Duration, Renewal and

<sup>3</sup> A copy of the relevant portions of the four local agreements at issue herein is attached to as Exhibits B (32-RC-5642), C (32-RC-5643), D (32-RC-5644), and E (32-RC-5645) respectively.



Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.

Either party wishing to change or terminate this Agreement must serve written notice of a desire to amend to the other party at least ninety (90) days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.

#### Case 32-RC-5645

#### ARTICLE XXV – DURATION OF AGREEMENT

Except as otherwise specifically provided, this Agreement shall be effective as of October 1, 2005, and shall continue in effect through the month, day, and year as specified in the National Agreement, Section 3: Scope of The Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.

Either party wishing to change or terminate this Agreement must serve written notice of a desire to amend to the other party at least 90 days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party

No representation petitions were filed with the NLRB during the window period 90 to 120 days prior to the September 30, 2008 expiration of the third year of the Agreement. However, pursuant to the reopener language of Section 3.D.1 and 2 of the National Agreement, during this window period the Intervenor gave the Employer timely notice of its intent to reopen the National Agreement. Thereafter, the parties began negotiations regarding wages and retiree medical benefits on July 7 and 8, 2008. The parties resumed these negotiations on August 4, 2008, and, on September 12, 2008, signed a Memorandum of Agreement providing for across-the-board wage increases and certain changes to retiree medical benefits.<sup>4</sup> Paragraph VII of the Memorandum asserts that "All terms and conditions of the National Agreement, referred to above, unless changed by the foregoing, shall be carried forward without change. The parties hereby reconfirm and agree to all such terms and conditions." As set forth in Section 3.D.2.a of the National Agreement, by entering into this Memorandum, the National Agreement "shall automatically renew itself for an additional two-year period." Finally, with regard to renewal of the local agreements, the

<sup>4</sup> A copy of the September 12, 2008 Memorandum of Agreement is attached hereto as Exhibit F.



National Agreement states that since a notice of reopening of the National Agreement was provided pursuant to Section 3.D.2 and the parties reached agreement on the reopener subjects prior to October 1, 2008, then under Section 3.D.3.c, the local agreements themselves were renewed for various periods ranging between 2010 through January 31, 2012.

### Analysis

The four petitions at issue in this matter were each filed on February 26, 2008. Petitioner asserts that the National Agreement is a five year contract which ceased to act as a contract bar as of October 1, 2008, the end of the third year of the contract. Accordingly, Petitioner asserts that the instant petitions were timely filed and should be processed. By contrast, the Intervenor and the Employer assert that the Memorandum of Agreement signed on September 12, 2008, acts as a contract bar which prevents me from processing these petitions. The Intervenor and the Employer assert that the Memorandum of Agreement either automatically rolled the contract over for an additional two years under a routine Evergreen clause analysis, or it constituted a reaffirmation of the contract under the *Southwestern Portland Cement Company*<sup>5</sup> doctrine.<sup>6</sup>

<sup>5</sup> 126 NLRB 931 (1960).

<sup>6</sup> As a threshold issue, Petitioner asserts on brief that I must conduct a hearing "to consider the bargaining history and intent of the parties in executing the Memorandum" of Agreement and to take evidence on "the complex interplay between the National Agreement and the local agreements" in order to determine "which should prevail from the point of view of contract-bar analysis." However, I reject Petitioner's invitation to conduct a hearing to take parole evidence on the issue of the parties' intent. The Board does not permit a party to use parole evidence of intent or alleged oral agreements to vary the terms of an unambiguous provision in a collective bargaining agreement. *Don Lee Distributor, Inc.*, 322 NLRB 470, 484 (1996); *Adobe Walls*, 306 NLRB 25 (1991); *NDK Corp.*, 278 NLRB 1035 (1986) (National labor policy requires that evidence of oral agreements be unavailing to vary the provisions of a written collective bargaining agreement that is valid on its face). As the Ninth Circuit has stated, "Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parole evidence is therefore not only unnecessary but irrelevant." *NLRB v. Electrical Workers Local 11*, 772 F.2d 571, 575 (9<sup>th</sup> Cir. 1985). I find the disputed provisions in this case to be clear on their faces. Therefore, the case before me involves the issue of what legal effect I should give to the undisputed language in the National and local agreements that I have quoted at length above. For the reasons set forth below, I find that this language effectively reaffirmed the original contract and evidences an intent to be bound to that contract for an additional two years.

Moreover, even if I were to consider and credit the declarations of Peter diCicco and Ralph Cornejo that Petitioner attached to its brief, I find that this additional evidence does not change the conclusions I have reached herein. In this regard, diCicco states in his declaration that when the National Agreement was being negotiated in 2005, the parties intended to create a five year contract but then inserted the limited third year reopener language into the agreement solely in an effort to create a contract bar in its 4<sup>th</sup> and 5<sup>th</sup> years. diCicco states that the Employer was adamant in these negotiations that the reopener be limited to wages and retiree medical benefits and that every other term of the agreement would remain unchanged for five years with no possibility of complete termination of the contract. In his declaration, Cornejo adds that in 2008 none of the local agreements were (or could have been) reopened and that the only bargaining that took place was at the national level. Cornejo also states that the parties in their public

In *General Cable Corporation*, 139 NLRB 1123, 1126 (1962), the Board established the basic principle that "contracts of definite duration for terms up to three years will bar an election for their entire period; contracts having longer fixed terms will be treated for bar purposes as three year agreements and will preclude an election for only their initial three years." The Board adopted the three year contract bar rule as a reasonable balance between the competing interests of the employee freedom to choose their own representatives and the interests in the stability of industrial relations. In the health care industry, if the parties have a contract that runs for three or more years, the appropriate window period for filing a representation petition is during the period not more than 120 days or less than 90 days prior to the end of the third year of the agreement, or anytime after the end of the third year of the agreement. *Trinity Lutheran Hospital*, 218 NLRB 199 (1975). It is black letter law that the parties to a contract can do nothing to eliminate the right of employees or a rival labor organization to file a representation petition during the appropriate window period.

Nevertheless, if no petition is filed during the appropriate window period, the parties to a contract are free to take certain steps that effectively eliminate the rights of employees or a rival labor organization to file a representation petition after the contract expires. Thus, the parties to the long-term contract can execute a brand new contract prior to the end of the third year of the original contract. This new contract would act as a contract bar for its entire term up to an additional three years. See, e.g., *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958); *Southwestern Portland Cement*, *supra*; and *Union Carbide Corporation*, 190 NLRB 191 (1971) (premature extension acted as a bar to a petition not timely filed with respect to the antecedent agreement). The parties to the contract can also agree to an Evergreen clause whereby, if neither party gives notice of their intent to terminate the agreement, the agreement rolls over for an additional period of time. Any such rolled-over agreement will itself act as a contract bar for the length of its rolled-over term not to exceed three years. For example, in *ALJUD Licensed Home Care Services*, 345 NLRB 1089 (2005), the parties had a three year contract effective from March 1, 2001 until February 28, 2004 with an automatic renewal clause renewing the contract for another three years if neither party gave notice to terminate. Since neither party gave such

---

statements consistently referred to the contract as a five year agreement. However, even if I were to consider and credit these declarations, they do not change my conclusion that the instant petitions are subject to a contract bar. In this regard, in examining the legal impact of the 2008 Memorandum on the contract bar issue, the only relevant considerations are the actual language of the Memorandum and the National and local agreements. If the legal effect of this language is that the contract was expressly reaffirmed for an additional two years and the parties indicated an intent to be bound for an additional two years, that ends my inquiry. In point of fact, the declarations from diCicco and Cornejo actually support my contract bar conclusion because they demonstrate that the intent of the parties in agreeing to this language was to create a contract bar after the end of the third year of the contract and they adopted this very language to ensure that this occurred.

notice, the agreement rolled over for 3 more years until February 28, 2007, and constituted a contract bar to a petition filed on March 25, 2004.

There is a third way that the parties to a long-term agreement can preserve the contract bar status of that agreement after the end of its third year – the parties can reopen some provisions of the contract and reach an agreement that expressly reaffirms the original agreement and clearly indicates an intent on the part of the parties to be bound for an additional specific term. “The Board does not distinguish between new agreements and amendments in applying contract bar rules.” *Union Carbide*, supra at 192. The seminal case in this area is *Southwestern Portland Cement*, supra. In that case the parties entered into a three year contract that was effective from June 1, 1957 to June 1, 1960, with a provision stating that either party could reopen the contract for the purpose of renegotiating wages only. Under the Board’s two year contract bar policy in effect at that time, this contract acted as a bar only until June 1, 1959. On July 21, 1957, the parties executed a supplemental agreement amending the contract with respect to wages and vacation benefits. On August 6, 1958, the parties executed a supplemental agreement to be effective June 1, 1958 regarding wages, seniority, and vacation benefits. On August 4, 1959, the parties signed a supplemental agreement with respect to wages, seniority, and health and welfare benefits. This supplement contained additional language stating that the original June 1, 1957 collective bargaining agreement, and the supplemental agreements dated July 21, 1957 and June 1, 1958 “shall remain in full force and effect and shall be binding upon the parties hereto except as herein amended and supplemented.” On these facts, the Board set forth the following rule:

Where, after the end of the first 2 years<sup>7</sup> of a long-term contract and before the filing of a petition, the parties execute (1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period, such new agreement or amendment shall be effective as a contract bar for as much of its term as does not exceed 2 years. *Id.* at 933.

Applying that rule to the case before it, the Board held that the 1959 supplemental agreements constituted an amendment “which expressly reaffirmed the original agreement and clearly indicated an intent on the part of the parties to be bound for a specific period. Under these circumstances, and as the petition was filed after the 1959 amendments to the contract were executed, we find that the amended contract constitutes a bar to this proceeding. *Id.* at 933-34.

<sup>7</sup> At the time this decision issued, the Board had in effect a two year contract bar rule. In *General Cable Corporation*, supra, the Board adopted a three year contract bar rule.

The Board reached a similar result in *Santa Fe Trail Transportation Co.*, 139 NLRB 1513 (1962). In that case the parties had a collective bargaining agreement that was effective from July 1, 1958 until July 1, 1964. On February 16, 1962, the parties signed a supplemental agreement which stated that the "agreements ... effective July 1, 1958 are hereby amended for the period from July 1, 1961 until July 1, 1964." That same day, a rival union filed a representation petition. The Board dismissed the petition. In so holding, the Board reasoned that "the quoted language was an express affirmation of the old agreement" under the rationale of *Southwestern Portland*, supra, and that the reaffirmed contract acted as a contract bar.<sup>8</sup>

In the case before me the following facts are undisputed:

- (1) The Intervenor and the Employer were parties to a five year National Agreement that provided for a reopener at the end of the third year of the agreement regarding two issues – wages and retiree medical benefits;
- (2) The Intervenor gave timely notice of its intent to reopen the Agreement on these two issues and the parties reached agreement on September 12, 2008

<sup>8</sup> See also, *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982). In that case the Board dismissed a petition on the basis of the contract bar doctrine, relying upon an amendment to the contract which was executed after the end of the 3<sup>rd</sup> year of the contract but prior to the filing of the petition. The Board reasoned that the parties' intent to reaffirm their original long-term agreement was clear from the face of the amendment since the amendment referenced that agreement and the duration clause provided that the amendment was to be effective through the remainder of the agreement. The Board also found significant the scope of the reopener, which allowed the parties to renegotiate the wage rate and other conditions of employment. The Board contrasted this with earlier amendments signed by the parties which were limited to wages only. However, the significance of this language is not that a reopener clause that is limited to wages and retiree medical benefits is per se too narrow in scope to extend the operation of the contract as a bar beyond the third-anniversary date. Rather, this case held that even where the reopener is so limited, it can still be found to extend the contract bar period if the midterm modification "expressly reaffirms the long-term agreement and expresses the intent of the parties to be bound for a specific period." Cf. *Victor Manufacturing & Gasket Co.*, 133 NLRB 1283 (1961) (supplemental agreement not a contract bar since it did not expressly reaffirm the long-term agreement nor indicate a clear intent on the part of the contracting parties to be bound for a specific period).

This holding is consistent with cases like *J.N. Ellison and H.R. Ellison d/b/a Ellison Brothers Oyster Co.*, 124 NLRB 1225 (1959), where the collective bargaining agreement contained an Evergreen clause and a provision giving either party the option of terminating the agreement with 60 days prior notice or giving 60 days prior notice to renegotiate wages only. Thereafter, when the union gave notice of its intent to renegotiate wages only, the Board held that this notice was insufficient to forestall the automatic renewal provisions of the contract, that the contract rolled over for another year, and a decertification petition filed after the renewal date was barred by the automatically renewed contract. By contrast, while the reopener in the instant case was limited to wages and retiree medical benefits, the resulting Memorandum of Agreement contained additional language expressly reaffirming the original agreement and indicating an intent to be bound until September 30, 2010.



(during the insulated period) on a Memorandum of Agreement reflecting that agreement;

(3) The second paragraph of the Memorandum states "This Memorandum of Agreement presents the new terms and conditions of the Reopener Subjects reached by the parties September 12, 2008 pursuant to the National Agreement Section 3.D Duration, Renewal and Reopening."

(4) Paragraph VII of the Memorandum states "All terms and conditions of the National Agreement, referred to above, unless changed by the foregoing, shall be carried forward without change. The parties hereby reconfirm and agree to all such terms and conditions;" and

(5) Paragraph 3.D.2.a of the National Agreement states "If this Agreement is reopened pursuant to Paragraphs D.1. and D.2., above, and the parties reach agreement with respect to the Reopener Subjects before October 1, 2008, this Agreement shall automatically renew itself for an additional two-year period, and any and all agreed upon changes with respect to Reopener Subjects shall be incorporated into this Agreement and the Relevant Local Agreements."

The issue before me is whether the above-quoted language from the Memorandum and the National Agreement contain terms sufficient, as a matter of law, to constitute a contract bar for a period of two additional years. Based upon the rationale in *Southwestern Portland Cement* and *Santa Fe Trail*, supra, I answer this question in the affirmative. Just as in those cases, I find that the language in these two documents "expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period" – i.e. October 1, 2008 through September 30, 2010. Therefore, I find that the Memorandum constitutes a contract bar to the processing of the instant petitions.

In so finding, I note that the facts in the instant case are readily distinguishable from the situation faced by the Board in *Coca-Cola Enterprises, Inc.*, 352 NLRB No. 123 (August 14, 2008), the case that Petitioner primarily relies upon on brief to support its argument that there is no contract bar. In *Coca-Cola*, the parties to a long-term agreement negotiated a memorandum of understanding (MOU) after the end of the third year of the agreement but before the petition was filed. However, the Board found that this MOU did not itself constitute a new contract, since it did not have a readily discernible effective date or expiration date (two material terms of any contract); it was not so complete as to constitute a contract in its own right; and it applied to only a section of the overall unit. Moreover, the Board found that the MOU did not satisfy the second prong of the *Southwestern Portland Cement* test since it did not incorporate by reference the terms of the long-term agreement, but merely referred it; and that rather than evidencing an intent by the parties to be bound for a specific period, the contents of the MOU reflected that it was written for the narrow purpose of addressing the employer's

implementation of a new delivery system for the drivers, who constituted only a portion of the bargaining unit. None of these distinguishing factors are present in the case before me.

I also reject Petitioner's two additional arguments on brief: (1) The Board will only find that a renewed contract can create a new contract bar where "there is at least a theoretical possibility of complete contract termination and actual bargaining;" and (2) The various local agreements are written in such a way that neither party can give a notice of termination that would prevent automatic renewal of those local agreements at the end of their third year, thereby making it impossible (at least without holding an evidentiary hearing) to determine whether it is the local agreements or the National Agreement that should prevail for purposes of contract bar analysis. First, I note that Petitioner's assertion that there must be at least a theoretical possibility of complete contract termination for an amendment to be found sufficient to renew a contract is at odds with the Board's conclusions in both *Southwest Portland Cement* and *Santa Fe Trail*, supra, where the Board held that contracts were effectively renewed even though there was no possibility of complete contract termination at the time of their respective reopeners.<sup>9</sup> Second, I note that the language of the National Agreement could not be clearer in establishing that the National Agreement takes precedence over any conflicting provisions in the local agreements, which includes any language regarding the duration of those local agreements. Thus, Section 3.B of the National Agreement states "If there is a conflict ... this Agreement shall supersede the local collective bargaining agreements." Therefore, I have resolved this case by relying upon the express language of the National Agreement establishing its supremacy over the local agreements and have rejected Petitioner's invitation to hold an evidentiary hearing on this issue.<sup>10</sup>

Accordingly, since the February 26, 2009 petitions were clearly filed outside of the appropriate window period and after the National and local agreements were reaffirmed for an additional two years, I find that a contract bar exists to the processing of these petitions. Therefore, I hereby dismiss the petitions in Cases 32-RC-5642, 32-RC-5643, 32-RC-5644, and 32-RC-5645.<sup>11</sup>

<sup>9</sup> See also, *Union Carbide Corporation*, 190 NLRB 191 (1971) (premature extension of contract executed at time when neither party had right to reopen the contract acted as bar to petition filed after end of appropriate window period). Cf. *M.C.P. Foods, Inc.*, 311 NLRB 1159 (1993) (premature extension not a bar to petition filed during window period at end of 3<sup>rd</sup> year of contract).

<sup>10</sup> Under the terms of Section 3.D.3 of the National Agreement, it could be argued that as a result of the signing of the Memorandum on September 12, 2008, some of the local agreements were renewed for periods in excess of three additional years. However, under the Board's rationale in *General Cable*, supra, these renewed agreements could serve as a contract bar for no more than three additional years – i.e. until October 1, 2011, and arguably only until the October 1, 2010 end of the renewed National Agreement.

<sup>11</sup> In the March 10, 2009 Order To Show Cause, I did not ask the parties to address the issue of whether a schism exists which would preclude application of the contract bar doctrine to this case. I note that the schism issue has already been raised and fully litigated by Petitioner in Case 20-RC-18222. On March 17,

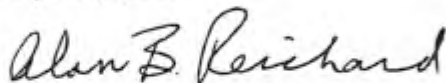


A review of this action may be obtained by filing a request therefore with the National Labor Relations Board, addressed to the Executive Secretary of the Board, 1099 14<sup>th</sup> Street, N.W. Washington, D.C.20570. A copy of such request for review must be served upon each of the other parties to the proceeding, including the undersigned. This request for review must contain a complete statement setting forth the facts and reasons upon which it is based. The request for review (8 copies) must be filed with the Board in Washington by April 21, 2009. Upon good cause shown, however, the Board may grant special permission for a longer period within which to file. The request for extension of time should be submitted to the Executive Secretary of the Board in Washington, and a copy of any such request for extension of time should be submitted to Regional Director, and to the other parties to this proceeding.

The request for review and any request for extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding, and it must be served in the same or faster manner as that utilized in filing the request with the Board; when filing with the Board is accomplished by personal service, however, the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail or fax.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at [www.nlrb.gov](http://www.nlrb.gov). On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Very truly yours,



Alan B. Reichard  
Regional Director

Enclosures

---

2009, Regional Director Joseph P. Norelli issued a dismissal letter which found, inter alia, that no schism exists. I hereby take administrative notice of and adopt this portion of Regional Director Norelli's decision.

cc: Ronald Goldman  
Senior Counsel  
Kaiser Permanente  
One Kaiser Plaza  
Oakland, CA 94612

Kathy Krieger  
Darrin Dalmat  
James & Hoffman  
1101 17<sup>th</sup> Street, NW, Suite 510  
Washington, D.C. 20036

Trustees  
SEIU, United Healthcare Workers-West  
560 Thomas L. Berkley Way  
Oakland, CA 94612

Michael J. Hunter  
Hunter, Carnahan, Shoub & Bayard  
3360 Tremont Rd., Second Floor  
Columbus, Ohio 43221

Latika Malkani  
Siegel & Yee  
499 14<sup>th</sup> Street, Suite 220  
Oakland, CA 94612

Bruce Harland  
David Rosenfeld  
Counsel to UHW  
101 Marina Village Parkway, Ste. 200  
Alameda, CA 94501-1091

Lafe Solomon, Director  
Office of Representation Appeals  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-3419

# National Agreement

KAISER PERMANENTE

COALITION OF KAISER PERMANENTE UNIONS

October 1, 2005

(L+M)<sup>P</sup>  
*The Power of Partnership*

## SECTION 3: SCOPE OF THE AGREEMENT

### A. COVERAGE

This Agreement applies only to bargaining units represented by local unions that Kaiser Permanente and the Coalition mutually agreed would participate in the national common issues bargaining process and who, prior to the effective date, agreed to include this Agreement as an addendum to their respective local collective bargaining agreements. Application to any other bargaining unit, other than newly organized bargaining units as described below, will be subject to mutual agreement of the parties.

The parties agree that when a local union signatory to this Agreement is recognized to represent a new bargaining unit of an Employer pursuant to the provisions of the Labor Management Partnership Agreement and the Recognition and Campaign Rules, the local parties shall use an interest-based process to negotiate the terms of a local collective bargaining agreement and the appropriate transition to this Agreement.

### B. THE NATIONAL AGREEMENT AND LOCAL AGREEMENTS

Provisions of local collective bargaining agreements and this Agreement should be interpreted and applied in the manner most consistent with each other and the principles of the Labor Management Partnership. If a conflict exists between specific provisions of a local collective bargaining agreement and this Agreement, the dispute shall be resolved pursuant to the Partnership Agreement Review Process in Section 1.L.2.

If there is a conflict, unless expressly stated otherwise, this Agreement shall supersede the local collective bargaining agreements; however, in cases where local collective bargaining agreements contain explicit terms which provide a superior wage, benefit or condition, or where it is clear that the parties did not intend to eliminate and/or modify the superior wage, benefit or condition of the local collective bargaining agreement, this Agreement shall not be interpreted to deprive the employees of such wage, benefit or condition. It is understood that it is not the intent of the parties to inadvertently enrich or compound wages, fringe benefits or other conditions or to create opportunities for "cherry picking," "double dipping," etc.

### C. NATIONAL AGREEMENT IMPLEMENTATION

The Partnership Strategy Group oversees and will hold their respective leaders accountable for implementation of the National Agreement, including:

- *coordinating an implementation plan;*
- *developing and enforcing accountability;*
- *sponsoring and chartering continued work;*
- *identifying needed support; and*
- *establishing metrics for implementation.*

### D. DURATION, RENEWAL AND REOPENING

1. The duration of this Agreement is October 1, 2005 through September 30, 2008. It shall automatically renew itself for an additional two year period (October 1, 2008 through September 30, 2010), unless either the Coalition (by its Executive Director) or Kaiser Permanente (by its Vice President for the LMP) gives the other party written Notice of Reopening no later than ninety (90) days and no earlier than one hundred, twenty (120) days prior to October 1, 2008.
2. If either party to this Agreement gives timely Notice of Reopening to the other as set forth in Paragraph D.1., this Agreement and all local agreements that incorporate this Agreement as an addendum ("Relevant Local Agreements") shall be reopened with respect to Across-the-Board wage adjustments and Retiree Medical Benefits only ("Reopener Subjects"). Any and all negotiations conducted pursuant to this reopener shall be conducted at the national level by the CIC. There shall be no local negotiations, and no other subjects shall be addressed.
  - a. If this Agreement is reopened pursuant to Paragraphs D.1. and D.2., above, and the parties reach agreement with respect to the Reopener Subjects before October 1, 2008, this Agreement shall automatically renew itself for an additional two-year period, and any and all agreed upon changes with respect to Reopener Subjects shall be incorporated into this Agreement and the Relevant Local Agreements.
  - b. If this Agreement is reopened pursuant to Paragraphs D.1. and D.2., above, and no agreement is reached with respect to the Reopener Subjects before October 1, 2008, this Agreement shall automatically renew itself for an additional two-year period on all other existing terms and conditions, provided, however, that the parties may continue to negotiate concerning the Reopener Subjects until such time as agreement is reached on those subjects or negotiations con-



clude. Any and all changes resulting from such continued negotiations shall be incorporated into this Agreement and the Relevant Local Agreements.

3. This Agreement also affects the duration, renewal and reopening of Relevant Local Agreements as follows:

- a. Unless otherwise effective earlier as set forth in paragraph 3.b., below, all Relevant Local Agreements shall be effective as of October 1, 2005 and remain in effect until midnight on September 30, 2008. They shall automatically renew themselves, unless Notice of Reopening is given in accordance with Paragraph D.1. above, for an additional period that depends on their classification under the 2000 National Agreement, as follows:
  - **GROUP I** (local collective bargaining agreements with expiration dates on or before September 30, 2005): The renewed period for Group I agreements will begin October 1, 2008 and expire on the anniversary in 2010 of their original Group I expiration date.
  - **GROUP II** (local collective bargaining agreements with expiration dates between October 1, 2005 and January 31, 2007): The renewed period for Group II agreements will begin October 1, 2008 and extend through January 31, 2012 on the anniversary of their original Group II expiration date. In the event of such automatic renewal, employees covered by Group II agreements will receive a wage increase on October 1, 2010 of not less than 3% ATB. The 3% may be increased by an escalator method based on the BTG wage philosophy factors recommended to the Common Issues Committee on July 6, 2000. The method will be determined no later than April 1, 2007. The method and its application will be subject to resolution in the review process in Section 1 of this Agreement.
  - **GROUP III** (local collective bargaining agreements with expiration dates on or after February 1, 2007): The renewed period for Group III agreements will begin October 1, 2008 and expire on or after February 1, 2012 on their original Group III expiration date. In the event of such automatic renewal, Group III agreements will be reopened on a staggered basis between October 1, 2010 and April 1, 2011. The actual dates to reopen each Group III agreement will be determined no later than April 1, 2007. Group III reopener settlements will apply to

the extended expiration date of the Relevant Local Agreement or for a new full term if jointly determined in local bargaining.

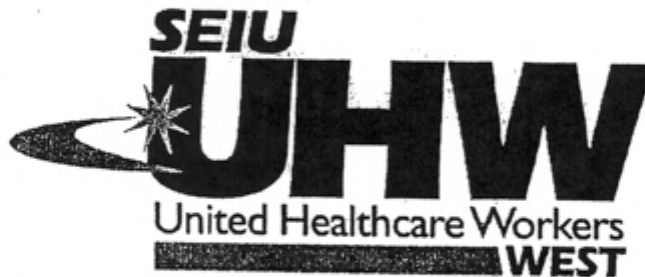
- b. Any Relevant Local Agreement entered into during the 2005 bargaining cycle prior to October 1, 2005 shall be effective as of the date of execution. Provisions of this Agreement incorporated as addenda to such a Relevant Local Agreement shall become effective as of October 1, 2005.
  - c. If Notice of Reopening is given in accordance with Paragraphs D.1. and D.2., above, the renewal provisions of Paragraphs D.2.a. and D.2.b. shall apply to the Relevant Local Agreements in the same manner as to this Agreement, except that the duration of a renewed Relevant Local Agreement shall be the period designated for its Group as set forth in Paragraph D.3.a., above.
4. All terms of the renewed Agreement shall expire at midnight on September 30, 2010, except for the wages, performance sharing opportunities, and benefits as identified in Section 2 of the Agreement. Those excepted provisions shall continue in effect until the expiration dates of the Relevant Local Agreements.

## E. LIVING AGREEMENT

The parties acknowledge that during the term of this Agreement, a party at the national level may wish to enter into discussions concerning subjects covered by this Agreement or to modify specific provisions of this Agreement or a party at the local level may wish to enter discussions concerning subjects covered by the local collective bargaining agreement or to modify its specific provisions. The parties agree that neither a union nor any Kaiser Permanente entity shall refuse to engage in such discussions. The parties further agree that, consistent with the Partnership principles set forth above, they will engage in such discussions with the intent to reach mutual agreement; however, during the term of this Agreement, no party shall be required to agree to any modifications of either this Agreement or the local collective bargaining agreement.



# UNITED HEALTHCARE WORKERS – WEST



## INTEGRATED BEHAVIORAL HEALTH SERVICES CHAPTER

---

### COLLECTIVE BARGAINING AGREEMENT

---



KAISER PERMANENTE®

NORTHERN CALIFORNIA

THE PERMANENTE MEDICAL GROUP, INC.

EFFECTIVE OCTOBER 1, 2005

Ex. B  
32-RC-5642

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the day and year first above written:

THE PERMANENTE MEDICAL GROUP, INC.

UNITED HEALTHCARE WORKERS-WEST  
Integrated Behavioral Health Service Chapter  
Service Employees International Union

\_\_\_\_\_  
ROBIN DEA  
Chair, Chiefs of Psychiatry

\_\_\_\_\_  
SAL ROSSELLI  
UHW President

\_\_\_\_\_  
TERENCE O'BRIEN  
Chair, Chiefs of CDRP

\_\_\_\_\_  
JOYCE BAIRD  
Regional Director

\_\_\_\_\_  
JESSE S. DRUCKER  
Sr. Labor Relations Consultant

\_\_\_\_\_  
DARIUS DAVENPORT  
Vice President

\_\_\_\_\_  
MARCIA DRAVIS  
Associate Medical Group Administrator

\_\_\_\_\_  
CLEMENT PAPAIZIAN  
Chapter President

\_\_\_\_\_  
TAMI MILLER  
Sr. HR Site Consultant

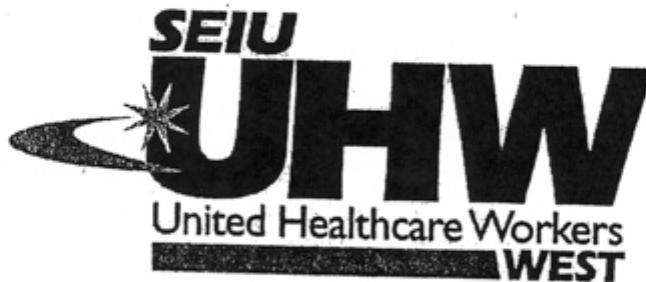
\_\_\_\_\_  
KAREN STEPHEN  
Secretary

\_\_\_\_\_  
DON MORDECAI  
Chief of Psychiatry

\_\_\_\_\_  
SUSAN STOFAN  
Field Representative

\_\_\_\_\_  
MARION LIM YANKOWITZ  
Behavioral Health Manager III

# UNITED HEALTHCARE WORKERS – WEST



MEDICAL SOCIAL WORKERS CHAPTER

---

COLLECTIVE BARGAINING AGREEMENT

---



KAISER PERMANENTE®

NORTHERN CALIFORNIA

KAISER FOUNDATION HOSPITALS

EFFECTIVE OCTOBER 1, 2005

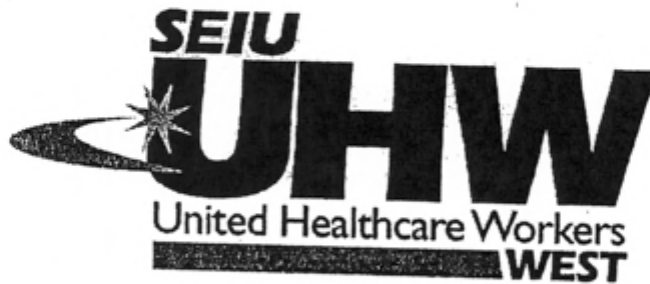
EX.C  
32-RC-5643

- 218 For details regarding the Joint Partnership Trust, please refer to the National Agreement, Section 1.

**ARTICLE XXIX – TERM OF AGREEMENT**

- 219 Except as otherwise specifically provided, this Agreement shall be effective October 01, 2005 and shall continue in effect through the month, day and year specified in the National Agreement, Section 3; Scope of the Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.
- 220 Either party wishing to change or terminate the Agreement must serve written notice of a desire to amend to the other party at least 90 days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.

**UNITED HEALTHCARE WORKERS – WEST**



**OPTICAL WORKERS CHAPTER**

---

**COLLECTIVE BARGAINING AGREEMENT**

---



**KAISER PERMANENTE®**

**NORTHERN CALIFORNIA**

**THE PERMANENTE MEDICAL GROUP, INC.**

**EFFECTIVE OCTOBER 1, 2005**

Ex. D  
32-RC-5644



- 282 The Employer and the Union recognize the rights of individuals to refuse to participate directly in therapeutic abortion procedures. Employees who wish to exercise those rights shall submit their written request to the Employer. The Employer shall honor such requests by making reasonable accommodation, except in an emergency situation, where the immediate nature of the patient's needs and rights shall take precedence over exercise of the employee's rights.

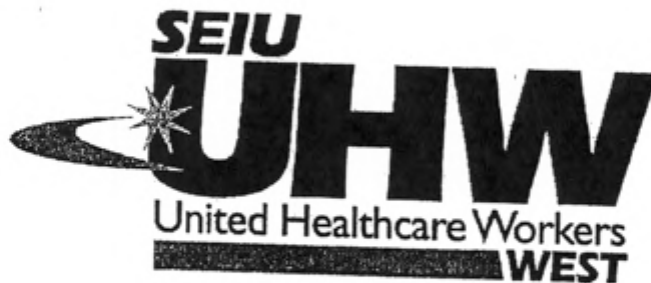
**ARTICLE XXVIII – CONFORMITY TO LAW**  
***SEIU Cross-Regional Agreement***

- 283 If any provision of this Agreement is found to be in conflict with State or Federal law, the remaining provisions of the Agreement shall remain in full force and effect. In the event any provision(s) are declared to be in conflict with any law, both parties shall meet immediately for the purpose of renegotiating only the provision(s) so invalidated.

**ARTICLE XXIX – DURATION OF AGREEMENT**

- 284 Except as otherwise specifically provided, this Agreement shall be effective as of October 1, 2005, and shall continue in effect through the month, day, and year as specified in the National Agreement, Section 3: Scope of The Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.
- 285 Either party wishing to change or terminate this Agreement must serve written notice of a desire to amend to the other party at least ninety (90) days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.

# UNITED HEALTHCARE WORKERS – WEST



---

## COLLECTIVE BARGAINING AGREEMENT

---



**KAISER PERMANENTE®**

**NORTHERN AND SOUTHERN CALIFORNIA**

KAISER FOUNDATION HEALTH PLAN, INC.  
KAISER FOUNDATION HOSPITALS  
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP  
THE PERMANENTE MEDICAL GROUP, INC.

EFFECTIVE OCTOBER 1, 2005

Ex. E  
32-DC-5645

1111 ARTICLE XXV – DURATION OF AGREEMENT

1112 Except as otherwise specifically provided, this Agreement shall be effective as of October 1, 2005, and shall continue in effect through the month, day, and year as specified in the National Agreement, Section 3: Scope of The Agreement, D. Duration, Renewal and Reopening and shall be automatically renewed from year to year thereafter, unless amended, modified, changed or terminated.

1113 Either party wishing to change or terminate this Agreement must serve written notice of a desire to amend to the other party at least 90 days prior to the expiration date. Notice of desire to change or terminate given by one party shall render unnecessary a similar notice by the other party.

1114 IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day herein above written.

## 2008 REOPENER BARGAINING

### MEMORANDUM OF AGREEMENT BETWEEN KAISER PERMANENTE AND THE COALITION OF KAISER PERMANENTE UNIONS

September 12, 2008

In 2005, Kaiser Permanente (hereinafter the "Employer") and the Coalition of Kaiser Permanente Unions (hereinafter the "Coalition") bargained a new National Agreement. That National Agreement provided either party the opportunity to reopen the Agreement with respect to wages and retiree medical benefits only ("Reopener Subjects") in the third year of the Agreement.

This Memorandum of Agreement presents the new terms and conditions of the Reopener Subjects reached by the parties September 12, 2008 pursuant to National Agreement Section 3.D Duration, Renewal and Reopening. The specific Reopener Subjects terms agreed to are as follows:

#### I. Across - The - Board (ATB) Wage Increases

Wages for all non-RN Partnership employees in California, Colorado & Northwest shall be improved as follows:

- 3% ATB effective on the first day of the pay period closest to October 1, 2008
- 3% ATB effective on the first day of the pay period closest to October 1, 2009
- 2% ATB effective on the first day of the pay period closest to April 1, 2010

Wages for all non-RN Partnership employees in Georgia, Mid-Atlantic States & Ohio shall be improved as follows:

- 3% ATB effective on the first day of the pay period closest to October 1, 2008
- 3% ATB effective on the first day of the pay period closest to October 1, 2009
- 1% ATB effective on the first day of the pay period closest to April 1, 2010

Texas Region employees shall receive a 3% ATB effective on the first day of the pay period closest to October 1, 2008

#### II. Registered Nurse (RN) ATB Increases\*

Wages for all RN Partnership employees in California, Colorado & Northwest shall be improved as follows:

- 4% ATB effective on the first day of the pay period closest to October 1, 2008
- 4% ATB effective on the first day of the pay period closest to October 1, 2009
- 2% ATB effective on the first day of the pay period closest to April 1, 2010

Wages for all RN Partnership employees in Georgia, Mid-Atlantic States & Ohio shall be improved as follows:

- 4% ATB effective on the first day of the pay period closest to October 1, 2008
- 4% ATB effective on the first day of the pay period closest to October 1, 2009
- 1% ATB effective on the first day of the pay period closest to April 1, 2010

9/16/2008

## 2008 REOPENER BARGAINING

\* The term RN means RN positions such as inpatient and outpatient RN (including Psychiatric RN), RNP, PA, CRNA, Nurse Midwife, Clinical Nurse Specialist or like positions jointly agreed to that are unique to the region.

### III. Healthcare Reimbursement Account (HRA)

Effective January 1, 2010, the parties agreed to establish a Healthcare Reimbursement Account (HRA) for bargaining unit employees covered by the National Agreement. An HRA will be set up for eligible employees who become plan participants when they retire in accordance with the plan document. However, UFCW Pharmacy Clerks in Southern California covered under the UFCW Pharmacy Health & Welfare Trust ("Trust") are eligible for reimbursement of the following health care expenses incurred under any plan of benefits offered by the Trust.

The account may be used to reimburse participants for medical, dental, vision and hearing care expenses that qualify as Federal income tax deductions under Section 213 of the Internal Revenue Code. Eligible employees shall convert 80% of unused sick leave accrued during or after 2006 to fund the HRA. It is expressly understood and agreed that this conversion of sick leave will replace, effective January 1, 2010, the 50% cash out set forth under the retirement conversion provision of the National Agreement and that said Agreement shall be modified accordingly. (A plan outline is attached.)

The parties agree to eliminate the existing post-2005 sick leave conversion to pension service credit.

The parties agree to address all Paid Time Off (PTO) designs and Extended Sick Leave (ESL) conversion issues applicable to HRA funding prior to the implementation of the HRA effective January 1, 2010.

### IV. Retiree Medical Benefit (RMB) for the Georgia and Mid-Atlantic States Regions & Colorado SEIU Local 105

Effective January 1, 2009, employees who are at least 55 years of age with at least fifteen (15) years of service who retire under the early, normal, or postponed provisions of the Kaiser Permanente pension plan shall receive Employer contributions to their respective defined contribution plans subject to the following limitations and provisions:

1. Normal and postponed retirees must have twenty five (25) years of service to receive the Employer contribution of \$185 per month for the retiree, his/her spouse and eligible dependents. Retirees are required to pay any difference over the \$185 per person, per month limit.
2. Employees with less than twenty five (25) years of service will have their contribution reduced by 4% each year under twenty five (25), with a minimum benefit of \$111 per person, per month.
3. Early retirees shall receive their Employer contribution when they become eligible for Medicare at age sixty five (65) for the retiree, his/her spouse and eligible dependents. Early retirees may continue basic medical coverage at their own expense until reaching age sixty five (65).
4. The existing plan in Colorado will continue and the medical coverage plan for Mid-Atlantic States and Georgia will be those individual KFHP plans or eligible COBRA plans that are available to the retiree in the region.



## 2008 REOPENER BARGAINING

- V. The parties agree to establish a high level, joint committee on Kaiser Foundation Health Plan (KFHP) membership growth. The committee shall be chaired by KFHP President & CEO, George Halvorson, Executive Medical Director of the Permanente Federation, Jack Cochran and Executive Director of the CKPU, John August. The committee shall consist of no more than six members with equal representation from each entity. The tri-chairs shall jointly craft the charge for the committee and develop its charter no later than thirty days following the date of ratification of this agreement.
- VI. The parties accept the recommendations of the Performance sub group as written and submitted to the Common Issues Committee (CIC) September 11, 2008. See attached.
- VII. All terms and conditions of the National Agreement, referred to above, unless changed by the foregoing, shall be carried forward without change. The parties hereby reconfirm and agree to all such terms and conditions.

CIC Member Signatures - In Agreement September 12, 2008:

[illegible]



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

December 20, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

On Friday, December 9, 2011, after the Boeing Company (Boeing) and the International Association of Machinists (IAM) completed an agreement that resolved their legal differences, the Office of the General Counsel (OGC) authorized approval of the withdrawal of the charge filed by IAM. Now that the case has been closed, many of the concerns expressed by the OGC with respect to due process and the integrity of this office's enforcement process have been satisfied. As a result, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I enclose a CD containing many of the documents contained in the Boeing case file. This production also serves as a partial response to your December 14, 2011 letter, further discussed below.

#### **Case File Documents**

Today's production consists of the OGC's Advice Memorandum, the parties' position statements, and witness affidavits. These were not available to opposing counsel, the Administrative Law Judge (ALJ) hearing the case, or the public while the case was pending.

The Advice Memorandum contains a thorough analysis of the factual and legal theory of the case and offers a roadmap of the litigation strategy. During the course of an open and ongoing enforcement action, this document is treated with a high level of confidentiality. It is created in order to provide advice about whether the charge allegations have factual and legal merit. It is being provided in full. The parties' position statements, provided to the OGC during the investigatory process, contain the work product, legal positions and evidence of the parties. Certain portions identified by Boeing as containing confidential, proprietary information have been redacted.

Finally, this production contains affidavits that were taken by agents of the OGC and prepared and submitted by the parties. Affidavits are the keystone of investigations conducted by the OGC as they provide a permanent record of testimony. Prior to providing information to the OGC, affiants are assured that their statement will be considered a confidential law enforcement record that will not be disclosed unless it becomes necessary to produce the affidavit in connection with a formal proceeding. In the typical unfair labor practice case, affidavits are disclosed only after a witness has testified, in large part, to shield witnesses from retaliation by either labor organizations or employers.<sup>1</sup> In keeping with those principles, we have redacted the personal contact information provided by affiants, the identity of low-level Boeing employees in favor or in opposition to the union, and Boeing's proprietary information.

I hope that the documents provided today, along with other documents already provided, will be useful in assessing the legal and factual basis of the complaint. As my staff has explained to Committee staff, we will be providing additional case file material as we continue to collect and review it.

### **Collective Bargaining Agreement and the Close of the Case**

In your December 14 letter, you request additional information about the OGC's role in the collective bargaining negotiations between the parties and about the dismissal of the Boeing complaint. As you know, the purpose of the National Labor Relations Act (NLRA) is to "eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining....*"<sup>2</sup> In addition to encouraging collective bargaining, the NLRA also protects certain enumerated rights for employer and employees.<sup>3</sup> In accordance with this statutory framework, prior to the decision to issue a complaint in this case, we worked diligently to encourage the parties reach an agreement that addressed their legal disputes. For your convenience, I have enclosed a May 19, 2011 letter from this office to Chairman Kline, House Committee on Education and the Workforce, in which we described in more detail our efforts to encourage the parties to reach an agreement prior to the issuance of the complaint.

Although the parties were unable to reach an agreement at that time, I remained convinced that an agreement was possible through a productive collective bargaining process. On October 8, 2011, I participated in a panel discussion organized by Boeing's counsel Michael Luttig. At the conclusion of that panel, Mr. Luttig and I exchanged pleasantries and I asked him if he thought it was possible for the parties to reach an agreement. He advised me that, if IAM made a proposal, Boeing would listen.

---

<sup>1</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978).

<sup>2</sup> 29 USC § 151 (emphasis added).

<sup>3</sup> 29 USC §§ 157-58.

The following morning, I met with Barry Kearney, head of our Division of Advice, and asked him to schedule a meeting at our office with IAM officials. Between October 7 and October 24, 2011, Mr. Kearney made several attempts to arrange a time for IAM officials to meet with me and my staff, but we were never able to find a mutually agreeable date and time. Although efforts to meet with IAM officials were not successful, my intention was to encourage them to make a proposal to Boeing and to emphasize the importance of the collective bargaining process to the future of the parties' relationship.

On October 24, 2011, Mr. Kearney learned from IAM officials that they were meeting with Boeing officials. IAM officials stressed the delicate nature of those discussions and requested that we not disclose the ongoing talks between the parties. Between October 28 and November 30, 2011, IAM officials contacted Barry Kearney, Regional Director Richard Ahearn, and me at various points to inform us that negotiations between Boeing and IAM continued. At no point during that time were we privy to proposals exchanged by the parties. Finally, on November 29 and 30, 2011, we received calls from IAM representatives Richard Michalski and David Campbell and from Boeing representative Mr. Luttig, who informed us that, pending ratification by IAM members, the parties reached a tentative collective bargaining agreement that resolved the legal dispute between the parties.

On December 8, 2011, after considering the collective bargaining agreement of the parties and after that agreement was ratified by the parties, counsel for the NLRB, Boeing, and the IAM moved jointly for ALJ Anderson to remand the case to our Seattle Office for further processing. Judge Anderson dismissed the complaint against Boeing and granted the request of the parties by remanding the case back to our Seattle Office.

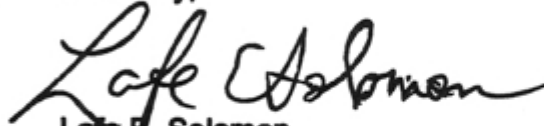
After discussions with the OGC, on December 9, 2011, Regional Director Ahearn approved the IAM's withdrawal request, bringing closure to this matter. The OGC approved the withdrawal request because we were convinced that the collective bargaining agreement reached by the parties promoted the central purpose of the NLRA and protected the rights guaranteed to the parties. This is the outcome we sought and one that is typical for our Agency. As you may know, about 90% of meritorious NLRB cases are resolved as a result of agreements between the parties or settlements with the Agency before the conclusion of litigation. I am pleased that the collective bargaining process has succeeded and that the parties have begun a promising new chapter in their relationship.

In addition to explaining this office's involvement in the negotiations between the parties, we have agreed to search the communications of OGC officials and to begin producing responsive materials after the holiday season. As discussed with your staff, we will prioritize our search by collecting the communications of ten OGC officials, including me, from June 2011 to the present, and by searching those communications with the keywords used to search subpoena responsive materials and with additional terms related to settlement and dismissal. In addition, I renew my offer to informally brief you and Ranking Member Cummings to address your questions about my decision to issue a complaint and my involvement in the collective bargaining process.

The Honorable Darrell Issa  
Page 4 of 4

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lyle E. Solomon". The signature is fluid and cursive, with the first name "Lyle" being more prominent.

Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

May 19, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

I am responding to your letter, dated May 5, 2011, to Acting General Counsel Lafe E. Solomon concerning the complaint issued on April 20, 2011, against The Boeing Company ("Boeing").

The concerns articulated by you appear to be based upon certain statements made by Regional Director Richard Ahearn in response to a reporter's questions about the charge filed against Boeing which had been published by the *Seattle Times* on June 4, 2010. During the course of this interview, Regional Director Ahearn was quoted as saying that there is no "bright line here" and that "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." He also added that "an initial ruling is weeks away." You appear to construe the statements quoted in this article as an official determination on the merits of this charge. Moreover, because the complaint, which was issued ten months after the interview, alleges that Boeing 'transferred' work from Washington State to South Carolina, you question this 'pivot in position' by NLRB officials and the 'unusual timing' of the issuance of the complaint. Your specific requests for information and our responses are set forth below.

1. A description of what transpired between June 2010 and April 2011 that led the NLRB to alter its opinion in this matter.

As explained more fully below, there are no 'inconsistencies' nor a 'pivot in position' surrounding the April 20, 2011 complaint.



General Counsel and the employer have both presented evidence, the trial judge must carefully assess and evaluate often conflicting evidence and draw reasonable inferences from the record. *Radio Officers v. NLRB* (A.H. Bell S. S. Co.), 347 U.S. 17 (1954). Thus, consideration of whether an employer violates Section 8(a)(3) requires a careful and balanced assessment of whether protected conduct of employees was a motivating factor in the employer's decision and whether the employer can affirmatively introduce evidence to demonstrate that the challenged action would have taken place regardless of the employees' protected activity.

Regional Director Ahearn's remarks in June 2010 merely reflect an appropriate appreciation of the delicate balancing and careful scrutiny of often conflicting evidence. They reflected his understanding that resolution of cases alleging unlawful discrimination do not turn on disputed legal principles, but on legal inferences to be drawn from an often voluminous factual record. In that regard, he noted that there is no "bright line" in the law that makes it immediately clear whether an action was illegal retaliation or a legitimate strategy when there are myriad facts and evidence to be carefully evaluated, as here. Further, his comments about harm being more readily apparent when a case involves existing, rather than new, work reflects a logical conclusion when comparing that which is tangible from that which may not be as evident. Notably, as indicated by the parties' active participation in the Region's investigation following the report of Regional Director Ahearn's aforementioned remarks, there was no confusion as to his meaning; their participation affirmed the understanding and reality that there had been no determination on the merits of the charge at that time.

As to Regional Director Ahearn's estimate of the timing of an initial determination, that determination was made months after Regional Director Ahearn's estimated time frame because the Acting General Counsel provided additional time to the parties to present their positions and evidence in detail to him personally for a full and fair analysis and to explore an informal resolution of their dispute in the interest of avoiding the need for complaint issuance and subsequent litigation.

2. All documents and communications between the NLRB Region 19 office and the NLRB National office addressing the Boeing complaint.

As you know, Case 19-CA-32431 is an open enforcement action in which the NLRB has alleged that Boeing violated Section 8(a)(3) of the Act. The case is currently set for a hearing before an administrative law judge on June 14, 2011. During that hearing, Boeing will have an opportunity to present evidence and challenge the legal theory of the NLRB. At that hearing, both Boeing and the Machinists will be afforded due process protections and a right to a fair trial. Ultimately, any issues raised by this complaint will be resolved by the Board and the courts after evaluating a comprehensive factual record and the arguments of all parties.

To our knowledge, your request is the first this Agency has ever received from a Committee of the House of Representatives with jurisdiction over the Agency seeking documents within litigation files of an open enforcement action. Our litigation files typically contain affidavit testimony obtained under a promise of confidentiality, as well as the privileged work product of our attorneys and "road maps" of our litigation plans and preparations. The Supreme Court has recognized the importance of protecting the NLRB's assurances of confidentiality. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-41(1978) (upholding NLRB's policy of withholding from FOIA disclosure of witness affidavits in open cases). In addition, premature disclosure of the Acting General Counsel's strategic plans could seriously compromise the litigation and result in an unfair advantage to one litigant over another.

The Agency takes seriously its judicially mandated obligation to protect the due process rights of its litigants. See, e.g., *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention).

3. All documents and communications that support the NLRB's position that work is being "transferred" in this case; and
4. Past precedent that supports a finding that Boeing violated Section 8(a)(3) and 8(a)(1) of the NLRA when it decided to locate, not transfer, a second assembly line.

Consistent with our response to your second request, we are not in a position to address the issues to be litigated in the public hearing on the complaint scheduled to begin on June 14 outside the context of that hearing. The information requested here goes to the crux of those issues. The basic facts and legal theory of the Acting General Counsel's cases are contained in the complaint, the related press releases and fact sheet which are attached to this letter and available on the NLRB's public website at <http://www.nlr.gov/node/443>.

In addition, we would be happy to provide the Committee with copies of the transcript and exhibits from the hearing contemporaneous with their availability, as well as copies of the post-hearing briefs to be filed by all parties. The transcript will provide a detailed accounting of the exact nature of the case and the facts proffered in support and rebuttal, which frame the bases for all legal arguments. The briefs will clearly detail the precise precedent invoked and relied upon.

We trust that the information provided above sufficiently addresses your concerns about the investigatory process and timing of the issuance of the complaint against Boeing. If you have further questions, we would be pleased to meet with you to discuss how we might accommodate further information needs that you may have, consistent with our need to protect the integrity of our legal processes. Please do not hesitate to contact Jose Garza,

The Honorable John Kline  
The Honorable Phil Roe  
Page 5 of 5

Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.

Sincerely,



Celeste J. Mattina  
Acting Deputy General Counsel

Attachments

cc: The Honorable George Miller  
Ranking Minority Members  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Robert E. Andrews  
Democratic Subcommittee Leader  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

---

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

ONE HUNDRED TWELFTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PLATTS, PENNSYLVANIA  
MICHAEL R. TURNER, OHIO  
PATRICK McHENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
CONNIE MACK, FLORIDA  
TIM WALBERG, MICHIGAN  
JAMES LANKFORD, OKLAHOMA  
JUSTIN AMASH, MICHIGAN  
ANN MARIE BUECKLE, NEW YORK  
PAUL A. GOSAR, D.D.S., ARIZONA  
RAUL R. LABRADOR, IDAHO  
PATRICK MEEHAN, PENNSYLVANIA  
SCOTT D. JARVIS, M.D., TENNESSEE  
JOE WALSH, ILLINOIS  
TREV GOWDY, SOUTH CAROLINA  
DENNIS A. ROSS, FLORIDA  
FRANK C. GUINTA, NEW HAMPSHIRE  
BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-6074  
FACSIMILE (202) 225-3974  
MINORITY (202) 225-5061  
<http://oversight.house.gov>

RODOLPHUS TOWNS, NEW YORK  
CARDLYN B. MALONEY, NEW YORK  
ELEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
DENNIS J. KUCINICH, OHIO  
JOHN F. TIERNEY, MASSACHUSETTS  
WM. LACY CLAY, MISSOURI  
STEPHEN F. LYNCH, MASSACHUSETTS  
JIM COOPER, TENNESSEE  
GERALD E. CONNOLLY, VIRGINIA  
MIKE QUIGLEY, ILLINOIS  
DANNY K. DAVIS, ILLINOIS  
BRUCE L. BRALEY, IOWA  
PETER WELCH, VERMONT  
JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

December 14, 2011

Mr. Lafe Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570-0001

Dear Mr. Solomon:

The decision by the National Labor Relations Board (NLRB) Office of General Counsel to dismiss its case against The Boeing Company (Boeing), following the ratification of a new collective bargaining agreement between the International Association of Machinists and Aerospace Workers (IAM) and Boeing,<sup>1</sup> is a victory for Boeing, its workers, and the people of South Carolina whose livelihoods have been in limbo throughout the course of the complaint. I welcome these actions; however, they do not erase the controversial nature of the complaint. Therefore, I write to inform you that the Committee's investigation into the NLRB's complaint against Boeing will continue. Further, to ensure that filing the complaint was not a strategic maneuver to provide IAM with leverage for a new collective bargaining agreement with Boeing,<sup>2</sup> the Committee also seeks information about the NLRB's involvement in those negotiations.

As you know, the NLRB's complaint against Boeing led to widespread and bipartisan criticism. Indeed, concerns were raised by the citizens of South Carolina,<sup>3</sup> Boeing employees,<sup>4</sup> legal experts,<sup>5</sup> sixteen attorneys general (from right-to-work states and non-right-to-work states),<sup>6</sup> two former NLRB chairmen,<sup>7</sup> and the third highest ranking Democrat in the U.S. House

<sup>1</sup> Press Release, *NLRB Acting General Counsel announces close of Boeing case*, National Labor Relations Board, Dec. 9, 2011.

<sup>2</sup> Dominic Gates, *Boeing, Machinists Reach Sweeping Agreement*, THE SEATTLE TIMES, Nov. 30, 2011.

<sup>3</sup> See House Oversight and Government Reform Committee hearing, *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise*, 112<sup>th</sup> Congress (June 17, 2011).

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Op-Ed, Philip Miscimarra, *The NLRB's Invisible Hand*, The Daily Caller (July 19, 2011).

<sup>6</sup> Amicus Curiae Brief of Sixteen State Attorneys General in Support of Respondent The Boeing Company, In Case 19-CA- Case 19-CA-32431.

<sup>7</sup> Philip Klein, *Former NLRB Chairman Says Board's Complaint Against Boeing is Unprecedented*, The Examiner (April 21, 2011); Keith Laing, *Former NLRB Chairman Under Bill Clinton Says Boeing Lawsuit 'Unprecedented'*, The Hill (May 18, 2011).

2011 DEC 20 P 5:51



**United States Government**  
**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**  
**Washington, DC 20570**  
**[www.nlrb.gov](http://www.nlrb.gov)**

**December 20, 2011**

**The Honorable John Kline, Chairman**  
**Committee on Education and the Workforce**  
**House of Representatives**  
**2181 Rayburn House Office Building**  
**Washington, DC 20515-6100**

**The Honorable Phil Roe, Chairman**  
**Subcommittee on Health, Employment,**  
**Labor and Pensions**  
**Committee on Education and the Workforce**  
**House of Representatives**  
**2181 Rayburn House Office Building**  
**Washington, DC 20515-6100**

**Dear Chairman Kline and Chairman Roe:**

I write in response to your December 16, 2011 letter seeking additional information about the theory and disposition of the Boeing case. We appreciate the opportunity to provide you with documents relevant to the legal theory of the case and to address your concerns about the resolution of the matter.

**Legal and Factual Basis of the Complaint**

Today I am providing a CD containing many of the documents contained in the Office of the General Counsel's (OGC) Boeing case file. This production consists of the OGC's Advice Memorandum, the parties' position statements, and witness affidavits. These were not available to opposing counsel, the Administrative Law Judge (ALJ) hearing the case, or the public while the case was pending.

The Advice Memorandum contains a thorough analysis of the factual and legal theory of the case and offers a roadmap of the litigation strategy. During the course of an open and ongoing enforcement action, this document is treated with a high level of confidentiality. It is created in order to provide advice about whether the charge allegations have factual and legal merit. It is being provided in full. The parties' position statements, provided to the OGC during the investigatory process, contain the work product, legal positions and evidence of the parties. Certain portions identified by Boeing as containing confidential, proprietary information have been redacted.



The following morning, I met with Barry Kearney, head of our Division of Advice, and asked him to schedule a meeting at our office with IAM officials. Between October 7 and October 24, 2011, Mr. Kearney made several attempts to arrange a time for IAM officials to meet with me and my staff, but we were never able to find a mutually agreeable date and time. Although efforts to meet with IAM officials were not successful, my intention was to encourage them to make a proposal to Boeing and to emphasize the importance of the collective bargaining process to the future of the parties' relationship.

On October 24, 2011, Mr. Kearney learned from IAM officials that they were meeting with Boeing officials. IAM officials stressed the delicate nature of those discussions and requested that we not disclose the ongoing talks between the parties. Between October 26 and November 30, 2011, IAM officials contacted Barry Kearney, Regional Director Richard Ahearn, and me at various points to inform us that negotiations between Boeing and IAM continued. At no point during that time were we privy to proposals exchanged by the parties. Finally, on November 29 and 30, 2011, we received calls from IAM representatives Richard Michalski and David Campbell and from Boeing representative Mr. Luttig, who informed us that, pending ratification by IAM members, the parties reached a tentative collective bargaining agreement that resolved the legal dispute between the parties.

On December 8, 2011, after considering the collective bargaining agreement of the parties and after that agreement was ratified by the parties, counsel for the NLRB, Boeing, and the IAM moved jointly for ALJ Anderson to remand the case to our Seattle Office for further processing. Judge Anderson dismissed the complaint against Boeing and granted the request of the parties by remanding the case back to our Seattle Office.

After discussions with the OGC, on December 9, 2011, Regional Director Ahearn approved the IAM's withdrawal request, bringing closure to this matter. The OGC approved the withdrawal request because we were convinced that the collective bargaining agreement reached by the parties promoted the central purpose of the NLRA and protected the rights guaranteed to the parties. This is the outcome we sought and one that is typical for our Agency. As you may know, about 90% of meritorious NLRB cases are resolved as a result of agreements between the parties or settlements with the Agency before the conclusion of litigation. I am pleased that the collective bargaining process has succeeded and that the parties have begun a promising new chapter in their relationship.

In addition to explaining this office's involvement in the negotiations between the parties, we intend to produce OGC communications that address your concerns about the resolution of the case and address other issues raised in your December 16 letter to the Committee on a rolling basis beginning after the holiday season. Finally, I offer to informally brief you both and Ranking Member Miller to supplement the multitude of documents this office has and will continue to produce to the Committee.

The Honorable John Kline  
The Honorable Phil Roe  
Page 4 of 4

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lafe E. Solomon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable George Miller, Ranking Minority Member  
Committee on Education and the Workforce



United States Government  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 19, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

I am responding to your letter, dated May 5, 2011, to Acting General Counsel Lafe E. Solomon concerning the complaint issued on April 20, 2011, against The Boeing Company ("Boeing").

The concerns articulated by you appear to be based upon certain statements made by Regional Director Richard Ahearn in response to a reporter's questions about the charge filed against Boeing which had been published by the *Seattle Times* on June 4, 2010. During the course of this interview, Regional Director Ahearn was quoted as saying that there is no "bright line here" and that "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." He also added that "an initial ruling is weeks away." You appear to construe the statements quoted in this article as an official determination on the merits of this charge. Moreover, because the complaint, which was issued ten months after the interview, alleges that Boeing 'transferred' work from Washington State to South Carolina, you question this 'pivot in position' by NLRB officials and the 'unusual timing' of the issuance of the complaint. Your specific requests for information and our responses are set forth below.

1. A description of what transpired between June 2010 and April 2011 that led the NLRB to alter its opinion in this matter.

As explained more fully below, there are no 'inconsistencies' nor a 'pivot in position' surrounding the April 20, 2011 complaint.

The underlying charge, which was filed on March 26, 2010, by the International Association of Machinists and Aerospace Workers District Lodge No 751 ("Machinists"), was thoroughly investigated by the Seattle Regional Office. At the time when Regional Director Ahearn's comments to a reporter's questions were reported in the *Seattle Times*, the Regional Office was in the midst of the investigation and no decision on the merits had been made. Indeed, following publication of Regional Director Ahearn's remarks, the parties continued to provide their evidence and arguments to the Seattle Regional office as part of that ongoing investigation. On multiple occasions between June 24 and August 25, 2010, the Machinists and Boeing each submitted evidence, documents, and/or statements to the Regional Office in support of their respective positions.

Upon completion of that investigation, on August 31, 2010, Regional Director Ahearn submitted the case to the Division of Advice in Washington, DC, for a determination on the merits of the charge, consistent with the long established practice followed by the NLRB Regional Offices in cases of national significance. The case was then thoroughly reviewed by the Division of Advice.

Recognizing the significance of this matter to both parties, on October 19, 2010, Acting General Counsel Lafe Solomon took the noteworthy step of inviting Boeing to come to our headquarters office to provide an oral presentation about its position on all issues to him. On December 15, 2010, Boeing made such a presentation. Boeing thereafter submitted additional evidence and position statements to the Acting General Counsel. The Acting General Counsel also invited the Machinists to provide a presentation. They made their oral presentation on January 19, 2011, and thereafter submitted additional support for their position in writing.

Beginning in late January 2011, and continuing through late March 2011, Acting General Counsel Solomon encouraged both parties to negotiate a resolution of this matter. When these attempts failed, Acting General Counsel Solomon decided to issue a complaint based on a careful consideration of the issues and all the evidence and arguments submitted by the parties. Regional Director Ahearn issued the complaint on behalf of the Acting General Counsel on April 20, 2011.

I note that Section 8(a)(3) of the National Labor Relations Act, which is alleged to have been violated in this case, prohibits employers from discriminating against employees in order to encourage or discourage membership in a labor organization. The U.S. Supreme Court has approved the NLRB's *Wright Line* rule in these cases. Pursuant to that rule, the General Counsel has the initial burden of persuading the trial judge by "a preponderance of evidence" that anti-union animus contributed to the employer's adverse action. The employer then has the opportunity to rebut the conclusion that it violated Section 8(a)(3) of the Act by proving, by a preponderance of the evidence, that it would have taken the adverse action even if the employees had not engaged in protected activity. *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983). After the

General Counsel and the employer have both presented evidence, the trial judge must carefully assess and evaluate often conflicting evidence and draw reasonable inferences from the record. *Radio Officers v. NLRB* (A.H. Bell S. S. Co.), 347 U.S. 17 (1954). Thus, consideration of whether an employer violates Section 8(a)(3) requires a careful and balanced assessment of whether protected conduct of employees was a motivating factor in the employer's decision and whether the employer can affirmatively introduce evidence to demonstrate that the challenged action would have taken place regardless of the employees' protected activity.

Regional Director Ahearn's remarks in June 2010 merely reflect an appropriate appreciation of the delicate balancing and careful scrutiny of often conflicting evidence. They reflected his understanding that resolution of cases alleging unlawful discrimination do not turn on disputed legal principles, but on legal inferences to be drawn from an often voluminous factual record. In that regard, he noted that there is no "bright line" in the law that makes it immediately clear whether an action was illegal retaliation or a legitimate strategy when there are myriad facts and evidence to be carefully evaluated, as here. Further, his comments about harm being more readily apparent when a case involves existing, rather than new, work reflects a logical conclusion when comparing that which is tangible from that which may not be as evident. Notably, as indicated by the parties' active participation in the Region's investigation following the report of Regional Director Ahearn's aforementioned remarks, there was no confusion as to his meaning; their participation affirmed the understanding and reality that there had been no determination on the merits of the charge at that time.

As to Regional Director Ahearn's estimate of the timing of an initial determination, that determination was made months after Regional Director Ahearn's estimated time frame because the Acting General Counsel provided additional time to the parties to present their positions and evidence in detail to him personally for a full and fair analysis and to explore an informal resolution of their dispute in the interest of avoiding the need for complaint issuance and subsequent litigation.

2. All documents and communications between the NLRB Region 19 office and the NLRB National office addressing the Boeing complaint.

As you know, Case 19-CA-32431 is an open enforcement action in which the NLRB has alleged that Boeing violated Section 8(a)(3) of the Act. The case is currently set for a hearing before an administrative law judge on June 14, 2011. During that hearing, Boeing will have an opportunity to present evidence and challenge the legal theory of the NLRB. At that hearing, both Boeing and the Machinists will be afforded due process protections and a right to a fair trial. Ultimately, any issues raised by this complaint will be resolved by the Board and the courts after evaluating a comprehensive factual record and the arguments of all parties.



To our knowledge, your request is the first this Agency has ever received from a Committee of the House of Representatives with jurisdiction over the Agency seeking documents within litigation files of an open enforcement action. Our litigation files typically contain affidavit testimony obtained under a promise of confidentiality, as well as the privileged work product of our attorneys and "road maps" of our litigation plans and preparations. The Supreme Court has recognized the importance of protecting the NLRB's assurances of confidentiality. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-41(1978) (upholding NLRB's policy of withholding from FOIA disclosure of witness affidavits in open cases). In addition, premature disclosure of the Acting General Counsel's strategic plans could seriously compromise the litigation and result in an unfair advantage to one litigant over another.

The Agency takes seriously its judicially mandated obligation to protect the due process rights of its litigants. See, e.g., *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention).

3. All documents and communications that support the NLRB's position that work is being "transferred" in this case; and
4. Past precedent that supports a finding that Boeing violated Section 8(a)(3) and 8(a)(1) of the NLRA when it decided to locate, not transfer, a second assembly line.

Consistent with our response to your second request, we are not in a position to address the issues to be litigated in the public hearing on the complaint scheduled to begin on June 14 outside the context of that hearing. The information requested here goes to the crux of those issues. The basic facts and legal theory of the Acting General Counsel's cases are contained in the complaint, the related press releases and fact sheet which are attached to this letter and available on the NLRB's public website at <http://www.nlr.gov/node/443>.

In addition, we would be happy to provide the Committee with copies of the transcript and exhibits from the hearing contemporaneous with their availability, as well as copies of the post-hearing briefs to be filed by all parties. The transcript will provide a detailed accounting of the exact nature of the case and the facts proffered in support and rebuttal, which frame the bases for all legal arguments. The briefs will clearly detail the precise precedent invoked and relied upon.

We trust that the information provided above sufficiently addresses your concerns about the investigatory process and timing of the issuance of the complaint against Boeing. If you have further questions, we would be pleased to meet with you to discuss how we might accommodate further information needs that you may have, consistent with our need to protect the integrity of our legal processes. Please do not hesitate to contact Jose Garza,

Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.

Sincerely,



Celeste J. Mattina  
Acting Deputy General Counsel

Attachments

cc: The Honorable George Miller  
Ranking Minority Members  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Robert E. Andrews  
Democratic Subcommittee Leader  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

MAJORITY MEMBERS:

JOHN KLISE, MINNESOTA, Chairman  
 THOMAS E. PETRI, WISCONSIN  
 HOWARD P. "BUD" MCKEN, CALIFORNIA  
 JUDY BRAGERT, ILLINOIS  
 TODD RUSSELL PLATT, PENNSYLVANIA  
 JOE WALSON, SOUTH CAROLINA  
 VIRGINIA FOIXE, NORTH CAROLINA  
 BOB GOODLATTE, VIRGINIA  
 DUNCAN HUNTER, CALIFORNIA  
 DAVID P. ROE, TENNESSEE  
 GLENN THOMPSON, PENNSYLVANIA  
 TIM WALBERG, MICHIGAN  
 SCOTT DELARUE, TENNESSEE  
 RICHARD L. HANNA, NEW YORK  
 TODD RICHTE, INDIANA  
 LARRY BUCHNER, INDIANA  
 TREY BOWDY, SOUTH CAROLINA  
 LOU BARLETTA, PENNSYLVANIA  
 KRISTI L. NORMAN, SOUTH DAKOTA  
 MARTHA ROBY, ALABAMA  
 JOSEPH J. HICK, MINNESOTA  
 DENNIS A. ROSE, FLORIDA  
 MIKE KELLY, PENNSYLVANIA



COMMITTEE ON EDUCATION  
 AND THE WORKFORCE  
 U.S. HOUSE OF REPRESENTATIVES  
 2181 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-8100

MINORITY MEMBERS:

GEORGE MILLER, CALIFORNIA, Ranking Member  
 DALE E. KILDEE, MICHIGAN, Vice Chairman  
 DONALD M. PAYNE, NEW JERSEY  
 ROBERT E. ANDREWS, NEW JERSEY  
 ROBERT D. "BOBBY" SCOTT, VIRGINIA  
 LYNN C. WOOLLEY, CALIFORNIA  
 RUBEN HINOJOSA, TEXAS  
 CAROLYN McARTHUR, NEW YORK  
 JOHN P. TIERNEY, MASSACHUSETTS  
 DENNIS J. KUCINICH, OHIO  
 RUSH D. HOLT, NEW JERSEY  
 BRYAN A. DAVIS, CALIFORNIA  
 RAUL M. GONZALEZ, ARIZONA  
 TIMOTHY H. BISHOP, NEW YORK  
 DAVE LOEBACK, IOWA  
 MAZE K. HIRONO, HAWAII  
 JASON ALTMIRE, PENNSYLVANIA

December 16, 2011

Lafe E. Solomon  
 Acting General Counsel  
 National Labor Relations Board  
 1099 14<sup>th</sup> Street, N.W.  
 Washington, D.C. 20570

Dear Acting General Counsel Solomon:

We write to renew and expand our request for documents and communications relating to your complaint against the Boeing Company (Boeing). While the case has been closed, immediate congressional oversight is necessary to settle a number of unresolved issues regarding the theory and disposition of the case. Thousands of jobs in South Carolina and many more across the country were threatened by this draconian enforcement action against a private employer. The need for oversight is only enhanced by your stated willingness to bring a similar suit in the future and the uncertainty this creates.

In response to a charge filed by the International Association of Machinists and Aerospace Workers District Lodge No. 751 (Machinists), on April 20, 2011, National Labor Relations Board (NLRB) Regional Director Richard Ahearn issued a complaint against Boeing. The complaint, which you authorized, alleges that statements made by Boeing executives beginning in 2009 and their decision to establish a second 787 Dreamliner in South Carolina constituted a unlawful violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA).<sup>1</sup>

Since the complaint was filed, the public has learned that no union employee at the Puget Sound facility lost his or her job or was financially harmed by Boeing's decision to locate the new assembly line in South Carolina. Despite these facts, your office pursued an extraordinary remedy that sought to force a private employer to relocate work underway in South Carolina to Washington.<sup>2</sup> In taking this action, you made clear your view that Boeing had, in fact, violated the NLRA, stating, "[t]he complaint involves *matters of fact and law* that are not unique to this case, and it was issued only after a thorough investigation in the field, a further careful review by our attorneys in Washington, and an invitation by me to the parties to present their case and discuss

<sup>1</sup> *Complaint and Notice of Hearing: The Boeing Company and International Association of Machinists and Aerospace Workers District Lodge 751*, Case 19-CA-32431, Page 6.

<sup>2</sup> *Id.* at 7-8.

2011 DEC 20 P 5:28  
 100-1010101  
 97  
 110

the possibility of a settlement. *Only then did I authorize the complaint alleging that certain statements and decisions by Boeing officials were discriminatory under our statute* [emphasis added].”<sup>3</sup>

On December 9, 2011, in the midst of a hearing intended to litigate these facts, at the Machinists request, you withdrew the charge against Boeing. The withdrawal was secured after the ratification of a four-year collective bargaining agreement between Boeing and the Machinists. While we are pleased Boeing and the union agreed to a new contract, this agreement is wholly unrelated to the complaint involving “matters of fact and law” your office pursued for almost eight months.

In your December 9 statement announcing the decision to withdraw the complaint, you noted that “[t]his is the outcome [you] have always preferred.”<sup>4</sup> You went on to say that you were “please[d] that the collective bargaining process has succeeded.”<sup>5</sup> Additionally, later that day, you stated “[i]f [you] were ever faced with a similar pattern, [you] might well issue a complaint.”<sup>6</sup>

Even though you have withdrawn the complaint at the request of the Machinists, it appears you continue to believe Boeing’s decision to locate this new work in South Carolina was a violation of the NLRA. Yet it still remains unclear what individuals in Washington were harmed, how the new labor agreement makes these individuals whole, and the NLRB’s role in those negotiations.

Due to these statements and the timing of your decision to withdraw the complaint, we are left to conclude your actions were intended to apply government pressure on a private employer in the middle of a labor dispute, which is wholly inconsistent with fostering collective bargaining and productive labor-management relations. A top priority of your office is to protect the rights of workers, not pick winners and losers in a labor dispute. The instability born from this bureaucratic overreach and threats of future overreach will undermine job creation across the country at a time we can least afford it.

Given the importance of this case and the fact that is now closed, we are renewing and expanding our request for documents and communications related to the April 20, 2011, complaint against the Boeing Company. Provide the following no later than January 3, 2011:

1. All documents and communications between the NLRB and outside parties relating to case 19-CA-32431;
2. All documents and communications between Acting General Counsel Lafe Solomon and NLRB Board Members relating to case 19-CA-32431;
3. All documents and communications relating to the settlement of case 19-CA-32431;

<sup>3</sup> National Labor Relations Board, <https://www.nlr.gov/news/acting-general-counsel-lafe-solomon-releases-statement-boeing-complaint> (last visited on December 14, 2011).

<sup>4</sup> National Labor Relations Board, <http://www.nlr.gov/news/nlr-acting-general-counsel-announces-close-boeing-case> (last visited on December 12, 2011).

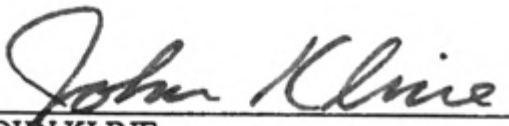
<sup>5</sup> *Id.*

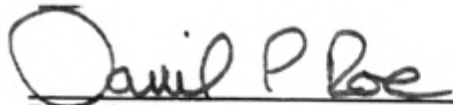
<sup>6</sup> *Labor board: Boeing case dropped, but more possible*, The Washington Times (December 9, 2011), <http://www.washingtontimes.com/news/2011/dec/9/labor-board-boeing-case-dropped-more-possible/>.

4. All documents and communications prepared by the Division of Advice relating to case 19-CA-32431;
5. All documents and communications between the NLRB Region 19 office and the NLRB National office addressing case 19-CA-32431 and the preceding charge by the Machinists; and
6. All documents and communications that support the NLRB's position that work was or is being "transferred" in case 19-CA-32431.

Thank you for your cooperation in this matter. If you have any questions regarding this request, please contact Marvin Kaplan of the committee staff at (202) 225-7101.

Sincerely,

  
JOHN KLINE  
Chairman  
Committee on Education and the Workforce

  
PHIL ROE, M.D.  
Chairman  
Subcommittee on Health, Employment, Labor  
and Pensions

cc: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

cc: The Honorable Robert Andrews, Senior Democratic Member, Subcommittee on Health, Employment, Labor, and Pensions





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

December 15, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Today, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I have enclosed a CD containing mostly unredacted emails that will be provided to Judicial Watch in redacted form pursuant to the Freedom of Information Act (FOIA). As a result, the Committee is receiving some information that is not being disclosed to the public pursuant to FOIA. The redactions made in this production are of non-germane material from some of the documents, personal privacy information from some documents, and portions of documents that reflect deliberative communications. Additionally, due to technical issues the bates numbers NLRB-00011402 and NLRB-00011403 are not used in this production.

Next week, the Office of the General Counsel will begin providing to the Committee documents contained in this office's Boeing case file. After the holiday season, this office will continue to provide case file documents to the Committee. We appreciate the opportunity to continue discussions with Committee staff about ways we can prioritize our productions to address the Committee's continuing interests in this matter. Finally, I am in receipt of your December 14, 2011, request for additional information. I have directed my staff to begin collecting responsive material and to provide it to the Committee in a timely manner.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laure E. Solomon', with a long horizontal flourish extending to the right.

Laure E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

December 2, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

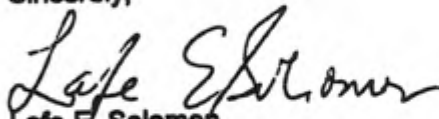
Dear Chairman Issa:

Today, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I have enclosed a CD containing unredacted emails that will be provided to Judicial Watch in redacted form pursuant to the Freedom of Information Act (FOIA). As a result, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA.

We have redacted non-germane material from some of the documents in this production and portions of documents that reflect deliberative communications. In addition, we have redacted legal memoranda, known as position statements, provided to the regional office by Boeing and the IAM, not currently available to the non-producing party. These documents contain evidence and the work product of Boeing and IAM attorneys. This office will continue to provide documents to the Committee on a rolling, expedited basis as the collection and review process described in our September 9, 2011 letter proceeds.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

November 17, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

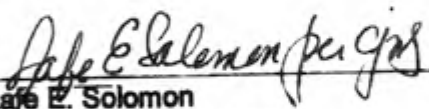
Dear Chairman Issa:

Today, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I have enclosed a CD containing unredacted emails that will be provided to Judicial Watch in redacted form pursuant to the Freedom of Information Act (FOIA). As a result, the Committee is receiving information that is not being disclosed to the public pursuant to FOIA. In addition, tomorrow we will provide you with a CD containing documents disclosed in response to a trial subpoena which are now available to all parties.

We have redacted non-germane material from some of the documents in this production. In addition, redactions have been made to portions of documents and communications that reflect confidential settlement discussions and deliberative communications. Many of the documents disclosed in response to a trial subpoena that will be produced tomorrow have been labeled "confidential" and also contain redactions. All assertions of confidentiality and redactions made to those documents were made by the producing party.

This office will continue to provide documents to the Committee on a rolling, expedited basis as the collection and review process described in our September 9, 2011 letter proceeds. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

  
Lyle E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

October 28, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Today, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I enclose a CD containing substantially unredacted emails that will be provided to Judicial Watch in redacted and unredacted form pursuant to the Freedom of Information Act (FOIA). As a result, the Committee is receiving information not available to the public pursuant to FOIA. This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

*Lafe E. Solomon*  
Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

October 21, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

Today, as part of my ongoing response to the subpoena served on this office on August 7, 2011, I enclose a CD containing substantially unredacted emails previously provided to Judicial Watch in redacted form pursuant to the Freedom of Information Act (FOIA).<sup>1</sup> As a result, the Committee is receiving information not available to the public pursuant to FOIA.

As Agency staff explained to Committee staff, the redactions made to documents produced under the FOIA were not simultaneously reviewed to determine if those redactions were appropriate for the Committee. My staff undertook a separate review of those documents to ensure we would provide unredacted documents to Congress, where appropriate.

I regret that this subsequent review led to the Committee receiving these documents after the Agency produced the redacted FOIA versions to Judicial Watch. My staff has pledged to ensure that the Committee receives documents contemporaneously with, if not before, any FOIA requesters. In this regard, my staff will produce additional emails and documents to the Committee next week.

---

<sup>1</sup> On Wednesday, October 19, 2011, Agency staff explained to Committee staff the exact nature of two documents that continue to be redacted. The first document has been redacted to protect the privacy of persons not employed by the Agency. The second document is a legal memorandum, known as a position statement, provided to the regional office by Boeing that is not currently available to IAM and contains evidence and the work product of Boeing attorneys.



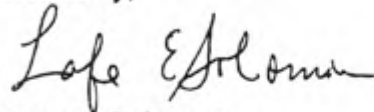
We continue to have serious concerns that the premature release of certain documents will infringe on the rights of the parties to this case and put the integrity of this ongoing law enforcement proceeding at risk. Specifically, the search requested by the Committee has and will continue to capture documents that contain deliberative material, settlement discussions, trial strategy, and confidential submissions by the parties and potential witnesses.

In addition, it is our view that subjecting agency officials, including the lead trial attorney on the case, to transcribed interviews poses significant risks to the proceeding and is unnecessary. For that reason, we appreciate your agreement to defer your request for an interview of the lead attorney in the Boeing case.

Agency staff has committed to addressing the concerns raised in the Committee's October 17, 2011 letter within the next two weeks and to improving communication with Committee staff about the nature of this office's ongoing productions to the Committee.

I reiterate my previous offer to informally brief you and Ranking Member Cummings to supplement the production of the thousands of pages of documents this office has already provided the Committee. I believe that an informal briefing would also serve to address any concerns you may have about the independence of my office and the integrity of our administrative investigation and decisions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lafe E. Solomon".

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PLATTIS, PENNSYLVANIA  
MICHAEL A. TURNER, OHIO  
PATRICK MICHELY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
CORN E. MACK, FLORIDA  
TIM WALBERG, MICHIGAN  
JAMES LANE FORD, OKLAHOMA  
JUSTIN AMASH, MICHIGAN  
ANN MARIE BUEKLE, NEW YORK  
PAUL A. GOSAR, D.D.S., ARIZONA  
RAUL R. LABRADOR, IDAHO  
PATRICK MEEHAN, PENNSYLVANIA  
SCOTT DESJARLAIS, M.D., TENNESSEE  
JOE WALSH, ILLINOIS  
TREV GOWDY, SOUTH CAROLINA  
DENNIS A. ROSS, FLORIDA  
FRANK C. GUINTA, NEW HAMPSHIRE  
BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (205) 225-6674  
FACSIMILE (202) 225-3074  
MINORITY (202) 225-6061  
<http://oversight.house.gov>

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

EDOLPHUS TOWNS, NEW YORK  
CAROLYN B. MALONEY, NEW YORK  
CLEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
DENNIS J. KUCINICH, OHIO  
JOHN F. TIERNEY, MASSACHUSETTS  
WM. LACY CLAY, MISSOURI  
STEPHEN P. LYNCH, MASSACHUSETTS  
JIM COOPER, TENNESSEE  
GERALD E. CONNOLLY, VIRGINIA  
MIKE DUGLEY, ILLINOIS  
DANNY K. DAVIS, ILLINOIS  
BRUCE L. BRALEY, IOWA  
PETER WELCH, VERMONT  
JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPEIER, CALIFORNIA

October 17, 2011

Mr. Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570-0001

Dear Mr. Solomon:

As you are aware, the Oversight and Government Reform Committee has been attempting to investigate the National Labor Relations Board's (NLRB) complaint against The Boeing Company (Boeing) since May 12, 2011.<sup>1</sup> Since then, you have continuously obstructed the Committee's constitutional duty to conduct oversight, and you have broken the law by effectively ignoring a congressional subpoena. In that regard, I was extremely disappointed to learn that the NLRB has withheld documents from the Committee, within the scope of the Committee's August 5, 2011, subpoena, that were produced to Judicial Watch on October 5, 2011, pursuant to a Freedom of Information Act (FOIA) request.<sup>2</sup> Shockingly, the dates of these documents coincide with the dates of documents that were produced to the Committee on September 9, 2011.<sup>3</sup> Magnifying such obstruction, these documents reveal that you and other representatives of the NLRB have not been truthful to the Committee and appear to be making calculated efforts to avoid compliance with the Committee's subpoena.

To date, you have made it clear that you do not intend to fully comply with the Committee's August 5, 2011, subpoena.<sup>4</sup> While you have attempted to mask such defiance under the cloak of the rights of the litigants, it now appears you have intentionally withheld responsive documents that do not implicate the rights of the litigants. Instead, they demonstrate the lack of the impartiality of the NLRB. On September 9, 2011, you made a partial document production to the Committee. These documents included, among other things, inconsequential

<sup>1</sup> Letter from Chairman Darrell Issa, House Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).

<sup>2</sup> See Press Release, Judicial Watch Obtains Documents from National Labor Relations Board Concerning Boeing Lawsuit (Oct. 5, 2011).

<sup>3</sup> See Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Sept. 9, 2011).

<sup>4</sup> See e.g., Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (Aug. 12, 2011).

emails, primarily from April 20, 2011, to August 6, 2011, exchanging trial documents and discussing other procedural matters related to the litigation. Then, on October 5, 2011, Judicial Watch released additional emails, within the same date range, that they obtained from NLRB under FOIA that you had not produced to the Committee. Yet, they were responsive to the subpoena and were within the agreed upon search terms. As you know, the search terms were meant to provide NLRB guidance, not serve as an exhaustive list.<sup>5</sup> Strikingly, included in these emails is an International Association of Machinists and Aerospace Workers (IAM) press release praising the NLRB's complaint against Boeing to which an NLRB attorney proclaimed "[h]ooray for the red, white, and blue"; another email chastises *The Wall Street Journal* for their reporting on the NLRB's complaint, saying "don't look at yesterday's WSJ; you'll puke."<sup>6</sup> Even after Judicial Watch made these biased emails public, your subsequent document production to the Committee did not include these emails. This is very troubling and creates the appearance that you discovered these emails, realized they were damaging to the NLRB, and intentionally withheld them from the Committee.

Amplifying my concerns are emails that indicate multiple NLRB representatives, including you, made misrepresentations to the Committee. As you know, the Committee repeatedly asked you to produce all documents and communications referring or relating to the Office of General Counsel's investigation of Boeing, including all communications between the Office of General Counsel and the National Labor Relations Board.<sup>7</sup> Yet, on May 27, 2011, Acting Deputy General Counsel, Celeste Mattina, informed me that "there are no responsive documents [to that request]."<sup>8</sup> Further, on June 8, 2011, Special Counsel for Congressional and Intergovernmental Affairs, Jose Garza, told Committee staff that there were no communications between the Office of General Counsel and the National Labor Relations Board related to the Boeing case.<sup>9</sup> Finally, on July 26, 2011, you informed me "there are no documents constituting or recording communications between the Office of General Counsel and the National Labor Relations Board related to the Boeing matter."<sup>10</sup>

Emails reveal those statements to be false. Indeed, on April 20, 2011, you sent an IAM press release hailing the NLRB's complaint against Boeing to then-NLRB Chairman Wilma Liebman.<sup>11</sup> Further, on May 5, 2011, you and then-Chairman Liebman were on an email chain that included an article by *The New Republic* praising the NLRB's complaint.<sup>12</sup> Not only do these emails undermine the independence of the Office of General Counsel, but they also demonstrate that the NLRB is acting as a rogue agency that believes it does not have to fully answer to Congress. Even worse, they reveal that you and your colleagues misled the

<sup>5</sup> Email from House Committee Staff to NLRB Staff (Aug. 11, 2011).

<sup>6</sup> Email between multiple NLRB staff (May 4, 2011; May 5, 2011).

<sup>7</sup> Letters from Chairman Darrell Issa, House Oversight and Government Reform Committee to Lafe Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011; July 12, 2011).

<sup>8</sup> Letter from Celeste Mattina, Acting Deputy General Counsel to Chairman Darrell Issa, House Oversight and Government Reform Committee (May 27, 2011).

<sup>9</sup> NLRB Briefing with Committee Staff (June 8, 2011).

<sup>10</sup> Letter from Lafe Solomon, Acting General Counsel, National Labor Relations Board to Chairman Darrell Issa, House Oversight and Government Reform Committee (July 26, 2011).

<sup>11</sup> Email from Lafe E. Solomon to Wilma B. Liebman (Apr. 20, 2011).

<sup>12</sup> Email from Wilma B. Liebman to Lafe E. Solomon and Nancy Cleeland (May 5, 2011).

Committee and intentionally tried to conceal communications between you and NLRB board members related to the Boeing case. This raises questions about the content of other documents you have failed to produce to the Committee and is especially alarming considering it can be a federal crime to obstruct a congressional investigation.<sup>13</sup>

In addition to NLRB's misrepresentations, emails reveal that NLRB representatives have attempted to slow walk the Committee's investigation. Communications between two NLRB attorneys indicate that the Committee's investigation "is going a lot faster than [NLRB counsel] projected" and queries—an astonishing two months after the Committee made its first inquiry—"have we sent them anything yet?"<sup>14</sup> Further, upon news reports about a possible congressional subpoena, NLRB Regional Director, Richard Ahearn, told a NLRB trial attorney, "we will politely decline."<sup>15</sup> It is astounding to me that a bureaucratic official would predetermine noncompliance with a congressional subpoena and disregard the NLRB's accountability to Congress. While the NLRB has produced some documents to the Committee, such limited productions, which are duplicative and consist of, among other things, news articles, trial documents "available to all parties" and emails circulating these documents between attorneys, are woefully incomplete and unacceptable. In light of the aforementioned revelations, it appears these productions are merely a diversion to slow down the Committee's investigative process.

Your continued personal obstruction, lack of compliance with a validly issued congressional subpoena, and false statements to the Committee are unacceptable. I hope that you will cease these obstructive efforts and immediately comply with the Committee's subpoena. In addition, to assist the Committee in understanding the extent of the NLRB's continued obstruction of a congressional investigation, I request you make the following individuals available for transcribed interviews starting the week of November 7, 2011:

1. Celeste Mattina, Acting Deputy General Counsel
2. Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs
3. Richard Ahearn, Regional Director
4. Barry Kearney, Associate General Counsel
5. Mara-Louise Anzalone, Trial Attorney
6. Nancy Cleeland, Office of Public Affairs

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

<sup>13</sup> 18 U.S.C. § 1505, states, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint Committee of the Congress—Shall be fined under this title, imprisoned not more than 5 years...."

<sup>14</sup> Email from Mara-Louise Anzalone to Anne Pomerantz (July 12, 2011).

<sup>15</sup> Email from Richard L. Ahearn to Peter G. Finch (July 12, 2011).

Mr. Lafe E. Solomon  
October 17, 2011  
Page 4 of 4

The NLRB's congressional affairs staff should contact the Committee to make arrangements for the interviews. If you have any questions about this request, please contact Kristin Nelson or Kristina Moore of the Committee staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

October 11, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing additional emails and attachments of agency officials. This office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'. The signature is fluid and cursive, with the first name 'Lafe' being particularly prominent.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

September 27, 2011

The Honorable Barbara Boxer, Chairman  
The Honorable Johnny Isakson, Vice Chairman  
Select Committee on Ethics  
United States Senate  
Hart Senate Office Building, Room 220  
Second and Constitution Avenue, NE  
Washington, DC 20510

Dear Senator Boxer and Senator Isakson:

In response to your letter to me dated September 21, 2011, I have enclosed the only document that is responsive to your request: the notes I made of several telephone conversations, including two telephone conversations that I had with Senator Lindsey Graham and one with Walt Kuhn, one of the members of his staff, on April 8 and April 11, 2011, prior to the issuance of the complaint against Boeing on April 20, 2011.

If I can be of any further assistance, please do not hesitate to contact me or Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700.

Sincerely,

A handwritten signature in black ink that reads 'Lafe E. Solomon'. The signature is written in a cursive, flowing style.

Lafe E. Solomon  
Acting General Counsel

Enclosure

3/18/11

Mike Luttig, Boeing's GC, called me at 2 pm. He told me that he was "miffed" that although he had done what I asked (gotten Boeing to agree that no unit ees would be laid off between now and the end of the contract expiration in Sept, 2012), I was still considering issuing complaint. I told him that the Machinists had proposed that the parties meet for a 2-week period with a mediator and that I thought that if Boeing accepted that offer, the parties might well reach a settlement. He told me that rather than accept that offer, he thought that he would go to the Hill to prevent me from litigating the case. I told him that he would have to get such a rider through the Senate. I said that I had the CEO on tape saying that the move to SC was not because of economics but because the Machinists strike. I said I had a triable case and that I would do whatever I thought was right under the NLRA. But I reiterated that I thought the parties should meet and try to reach a settlement.

3/28/11

Luttig called and I asked Barry Kearney to be on the call with me. Luttig said that Boeing would not agree to a conversation with the Machinists with a mediator, but that he was willing to talk to them. He said he would call them this week.

4/8/11

Senator Graham called me at 11:15 am. I was in the Museum of Modern Art in NYC and talked to him on my cell phone. He told me that the "retaliatory charge" of the Machinists against Boeing would have huge economic and political consequences. He said that the charge would scare Boeing's customers and could affect orders. He said that the political fallout would be huge and that he was more reasonable than his Senate counterpart (Sen. De Mint).

I explained to him that I had been trying to settle this case for the last 6 months, and I asked for his help in getting Boeing to agree to the Machinists' request for a 2-week mediated conversation. I told him that this case had every potential to settle as Boeing's business was booming and that the parties had both indicated to me that their futures were tied to a successful relationship in the future, but that I had been unsuccessful in getting the parties to talk to each other, rather than to me. I also told him that I would not be seeking the dismantling of the S.C plant and that I had made it clear to the Machinists that that plant was here to stay.

He said that he was pessimistic that the Machinists and Boeing could work things out, but that he never thought it was a bad idea to talk. I thanked him for being willing to help.

4/11/11

I left a message for Debbie Durkin, the aide to Senator Graham who placed the call on Fri. I received a call back from Walt Kuhn at noon. I told him that I was following up on my

conversation with the Senator on Fri and that I wanted to know if he had been successful in contacting Boeing. He said that the Senator would call me back later this week. I told Walt that I was ready to begin the complaint process and that I could not hold it up indefinitely. I said that I wanted to talk to the Senator today if possible, and he said that he would see what he could do.

4/11/11

Senator Graham called me at 3 pm. He said that he had talked to Boeing, and they had no interest in mediating the complaint, which was totally without merit. He said that he agreed with Boeing and understood their position. He said that if a complaint was filed, it will be "nasty," "very, very nasty." He said that this was a case of how not to grow the economy. He said that we had to do what we had to do, and he had to do what he had to do. It was up to us. He said that if complaint issued, he was going "full guns a-blazing."

## United States Senate

SELECT COMMITTEE ON ETHICS  
HART SENATE OFFICE BUILDING, ROOM 220  
SECOND AND CONSTITUTION AVENUE, NE  
WASHINGTON, DC 20510-6425

September 21, 2011

Mr. Lafe Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W., Room 10100  
Washington, DC 20570

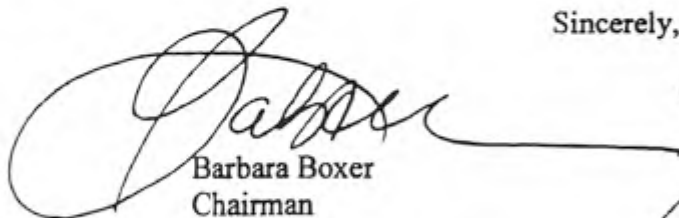
Dear Mr. Solomon:

The United States Senate Select Committee on Ethics is conducting a preliminary inquiry into allegations that a person or persons within its jurisdiction may have engaged in conduct violating Senate rules. The Committee's authorizing resolution, S. Res. 338, 88<sup>th</sup> Congress, extends its investigation jurisdiction to allegations of improper conduct by Members, officers, and employees of the United States Senate.

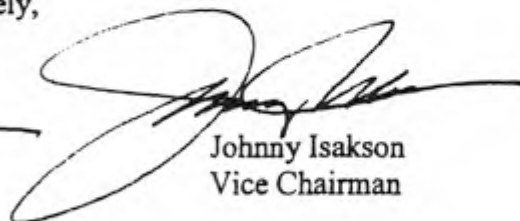
Based on your informal conversations with Committee staff, the Committee understands that you had telephone conversations with Senator Lindsey Graham and members of Senator Graham's staff on or about April 8, 2011, and April 11, 2011, concerning matters pertinent to the Committee's inquiry. Accordingly, the Committee requests that you produce any and all documents constituting, memorializing, reflecting or relating to, in whole or in part, your telephone calls with Senator Graham or any member of Senator Graham's staff on or about April 8, 2011, and April 11, 2011, or at any other time, concerning the Boeing investigation. The Committee requests that you produce the documents pertinent to the Committee's inquiry within two weeks.

Thank you in advance for your prompt cooperation in this matter. A copy of the Committee's Rules of Procedure is enclosed with this letter. If you have any questions about this request, please do not hesitate to contact John C. Sassaman, Chief Counsel to the Committee, at (202) 224-2981.

Sincerely,



Barbara Boxer  
Chairman



Johnny Isakson  
Vice Chairman

cc: Jose Garza, Special Counsel for Congressional  
and Intergovernmental Affairs





# United States Senate

## SELECT COMMITTEE ON ETHICS

SARARA BOXER, CALIFORNIA, CHAIRMAN  
JOHN W. ISAKSON, GEORGIA, VICE CHAIRMAN

MARK PRYOR, ARKANSAS  
SHERROB BROWN, OHIO

PAT ROBERTS, KANSAS  
JAMES E. RISCH, IDAHO

Telephone: (202) 224-2961  
Facsimile: (202) 224-7416



TO: Jose Garza, Esq.

DATE: 9/21/11

FAX#: (202) 273-0055

PAGES + COVER: 2

### FROM:

- ☒ John Sassaman
- ☐ Matt Mesmer
- ☐ Tremayne Bunaugh
- ☐ William Corcoran
- ☐ Lynn Tran
- ☐ Rochelle Ford
- ☐ Tonia Smith

- ☐ Annette Gillis
- ☐ John Lewter
- ☐ Danny Remington
- ☐ Emily Chucovich
- ☐ Chelsey Simonovich
- ☐ Philip Kibby
- ☐ Becca Steele

---

COMMENTS:



United States Government

**NATIONAL LABOR RELATIONS BOARD**

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

[www.nlrb.gov](http://www.nlrb.gov)

September 19, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

This letter serves as my continuing response to the subpoena served on the National Labor Relations Board, Office of the General Counsel on August 7, 2011. In that regard, I am enclosing a CD containing documents disclosed in response to a trial subpoena which are now available to all parties. In addition, this office will continue to provide documents to the Committee on a rolling basis as the collection and review process described in our September 9, 2011 letter proceeds.

Many of the documents included in this production have been labeled "confidential" and contain redactions. All assertions of confidentiality and redactions made to the documents were made by the producing party. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700 if you would like additional assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lafe E. Solomon'.

Lafe E. Solomon  
Acting General Counsel

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government

**NATIONAL LABOR RELATIONS BOARD**

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

[www.nlrb.gov](http://www.nlrb.gov)

July 29, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

I regret that you have declined to apply your fair and balanced ruling from the June 17, 2011 field hearing to the Agency's ongoing production of documents to your Committee.

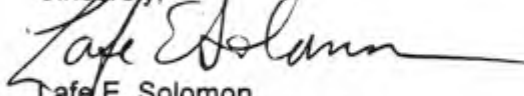
I understand and acknowledge the authority of Congress to conduct oversight. I continue, however, to believe that public disclosure of evidence and documents not currently available to the parties and the administrative law judge in the ongoing hearing in Seattle, Washington, risks harm to the integrity of the ongoing legal proceedings and could advantage one litigant over another. I fail to see how that outcome could be avoided if the Agency made available to the Committee, and indeed the entire House of Representatives, all of the documents in our case file.

Accordingly, I respectfully urge you not to issue a subpoena compelling production of documents in a case being actively litigated. Instead, I hope you will continue to work with me to find a compromise that allows me to allay your concerns, while protecting our legal processes and the fundamental right of parties to a fair trial.

To date, Agency staff has met with Committee staff to answer their questions, we have provided the Committee with over 1,000 pages of documents related to this case, and I appeared at a field hearing in North Charleston, South Carolina to answer Committee Members' questions about the case. In addition, along with this letter and pursuant to my previous offer, I will provide the Committee with additional documents that are part of the trial record in this case. I trust that this information will continue to provide meaningful insight about the legal basis for the complaint.

I sincerely hope that we can reach a compromise to this unnecessary controversy. In that regard, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700, to explore a mutually satisfactory solution.

Sincerely,

  
Lafe E. Solomon  
Acting General Counsel

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform



United States Government

**NATIONAL LABOR RELATIONS BOARD**

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

[www.nlrb.gov](http://www.nlrb.gov)

July 26, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

I write in response to your July 12, 2011 letter concerning the Committee's request for documents related to Case No. 19-CA-032431 ("The Boeing case"). The Office of the General Counsel has previously supplied the Committee with a number of relevant public documents concerning this ongoing enforcement action, now pending before an administrative law judge. In addition, the Acting Deputy General Counsel, Celeste J. Mattina, and I have previously replied to your inquiries about communications between the Office of the General Counsel and the White House, as well as between the Office of the General Counsel and the National Labor Relations Board, about the Boeing case, by indicating that there have been none. We have repeatedly offered to provide the Committee with a substantial amount of additional documentary information, including all hearing transcripts, exhibits, motions, orders, and post-hearing briefs. I continue to believe that this offer is responsive to your request and properly balances the Committee's legitimate informational needs with our legitimate needs to safeguard the due process rights of the parties and maintain the integrity of the ongoing legal proceeding. Therefore, I respectfully ask that you reconsider our request to apply your June 17 ruling at the South Carolina hearing to our production of documents, which would allow the Committee to have access to requested information as soon as it becomes available to the parties and the administrative law judge at the hearing.

On May 12, you sent me an oversight request regarding the Boeing case.<sup>1</sup> The request sought "[a]ll documents and communications referring or relating to the Office of the General Counsel's investigation of Boeing, including but not limited to all communications between the Office of the General Counsel and the National Labor Relations Board," and communications between the Agency and Boeing and the Machinists.<sup>2</sup> Acting Deputy General Counsel Celeste J. Mattina replied to this oversight

<sup>1</sup> Letter from Reps. Darrell Issa, Dennis Ross, and Trey Gowdy to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 12, 2011).

<sup>2</sup> *Id.*

request on May 27.<sup>3</sup> The response expressed our concern that the disclosure of documents and information not available to both Boeing and the Machinists could result in an unfair advantage to one party over another and risk harm to the integrity of the Agency's legal process. The response also provided the Committee with documents that contained the facts and legal theories of our case, and informed the Committee that there are no documents constituting or recording communications between the Office of the General Counsel and the National Labor Relations Board related to the Boeing matter. Finally, the response offered to provide the Committee with copies of the transcripts and exhibits from the hearing contemporaneous with their availability, as well as copies of all post-hearing briefs filed.

On May 26, you sent me a letter requesting my testimony at a Committee hearing on Friday, June 17, in North Charleston, South Carolina.<sup>4</sup> The letter stated the purpose of the hearing was to explore the NLRB's decision to file a complaint against Boeing for alleged violations of federal labor law. On June 3, I respectfully declined your invitation, advising that my appearance at the Committee hearing could threaten the rights of Boeing and the Machinists to a fair trial before the administrative law judge.<sup>5</sup> On June 7, you requested that I reconsider your invitation to testify at the Committee hearing in South Carolina.<sup>6</sup> You acknowledged the due process rights of the parties to the Boeing case, but expressed your view that my testimony before the Committee did not jeopardize those rights because the hearing did not "concern [my] decision-making strategy or [my] legal strategy." I responded on June 10, reiterating the concerns I had previously expressed, and offering to have Associate General Counsel Richard Siegel, who was not involved in the determination of the merits of this case, testify in the hearing, in a further attempt to meet the needs of the Committee without adversely impacting the rights of the litigating parties or unduly interfering with an enforcement action. On June 14, you rejected all of my offers and insisted upon my presence at the hearing.<sup>7</sup>

On June 17, I reluctantly appeared, under threat of subpoena, to testify at the Committee hearing in South Carolina. After discussion among Committee members, and prior to the acceptance of any testimony, you ruled that "[a]ny item which is not discoverable by the defendant, will be considered out of bounds for any question."<sup>8</sup> In

<sup>3</sup> Letter from Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board, to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (May 27, 2011).

<sup>4</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 26, 2011).

<sup>5</sup> Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, to Rep. Darrell Issa (June 3, 2011).

<sup>6</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (June 7, 2011).

<sup>7</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (June 14, 2011).

<sup>8</sup> *Field Hearing on Unionization and Regulation Issues as It Relates to the National Labor Relations Board's Complaint against Boeing; Hearing before the House Oversight and Government Reform Committee*, 112th Cong. (2011) (excerpts from unofficial transcript) (although the Agency has requested the official transcript from the Committee, it is not yet available).



other words, you concluded that it would be inappropriate for Committee members to ask me to provide information not yet available to Boeing. As a result of the ruling, the hearing continued with a reduced risk of harm to the due process rights of the litigants.

On June 29, I sent additional documents for the Committee's review, accompanied by a cover letter wherein I expressed my view that your ruling at the June 17 Committee hearing "strikes an appropriate and fair balance between the Committee's legitimate informational needs and the Agency's legitimate need to secure the due process rights of the parties to a fair trial" and stated that "extending the application of your ruling to the document request would continue to ensure fairness to the litigants."<sup>9</sup> Responding on July 12, you rejected my view that your approach at the South Carolina hearing, which limits production of information to that which is discoverable by Boeing in order to protect the due process rights of the litigants to the case, was the fairest way to proceed.<sup>10</sup>

It remains my belief that premature disclosure of the Boeing case file would severely impact the parties' due process rights and the Agency's legal processes. You have asserted that these concerns are overcome by the Committee's need to assess the claims made by Boeing that the complaint issued against it is "legally frivolous."<sup>11</sup> Indeed, Boeing, in its Motion to Dismiss, contended to Administrative Law Judge Clifford Anderson that the complaint was legally frivolous. Administrative Law Judge Anderson has denied that Motion, thus supporting my position that the Boeing complaint has legal merit.<sup>12</sup> This ruling has come at an early stage of the ongoing legal proceeding. Clearly, Boeing has a right to continue to challenge our facts and legal theories throughout the legal process and will be afforded the due process protections prescribed by Congress at every step of the proceeding. The documents related to Judge Anderson's decision have been previously provided to the Committee. The documents are noteworthy because they clearly demonstrate the correctness of your June 17 ruling. They demonstrate that the Agency can satisfy the Committee's need for information by continuing to provide documents consistent with that ruling.

The Agency's interests are both clear and critical: to safeguard the rights of the parties to the case and maintain the integrity of the Agency's legal process. We were therefore in agreement when you ruled at the hearing in South Carolina that it would be inappropriate for Committee members to ask me to provide information not yet available to Boeing.

With all due respect, we urge you to continue to apply the above ruling as it relates to documents involving the Boeing case. We frankly find no rationale for distinguishing information provided to the Committee in the form of testimony from

<sup>9</sup> Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, to Rep. Darrell Issa (June 29, 2011).

<sup>10</sup> Letter from Rep. Darrell Issa to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (July 12, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> See Resp.'s Mot. To Dismiss and Strike Injunctive Relief, AGC's Opposition to Resp.'s Motion to Dismiss and Strike, ALJ Ruling on Resp. to Motion to Dismiss.



information provided to the Committee in the form of documents. Rather, the framework that you established at the hearing remains necessary as long as this legal proceeding remains active while the Committee is conducting oversight.

Your July 12 letter seeks the following three broad categories of "documents and information" attendant to the Boeing case: intra-Agency and external documents and communications related to the underlying investigation; communication logs and messages pertaining to dealings between Agency personnel and the Machinists; and communication logs and messages pertaining to dealings between Agency personnel and Boeing. These three broad categories duplicate, in large part, the information sought by Boeing in its Subpoena Duces Tecum B-647901, served upon Counsel for the Acting General Counsel in the ongoing proceeding. Specifically, Boeing's information requests 1, 2, 5 through 17, and 23 (set forth on pages 5 through 9 of its subpoena), which were attached as Exhibit A to our petition to revoke the subpoena and provided to the Committee on June 29, 2011, explicitly encompass those documents sought by the Committee.

Notably, Administrative Law Judge Anderson denied the requests made by Boeing for substantially the same information you are also seeking. He properly determined that it is not appropriate for Boeing to have the documents that it seeks at this point in the process since it is tantamount to pre-trial discovery, which is not afforded to litigants in NLRB proceedings. He cited two cases (*Red Way Carriers*, 274 NLRB 1359, 1371 (1985), and *Ross M. Madden v. HOD Carriers Local 41*, 277 F.2d 688 (7<sup>th</sup> Cir. 1960), cert. denied, 364 U.S. 863 (1961)) in his ruling regarding the appropriateness of protecting Agency documents, and was clear that precedent dictates that the proper way to test the quality of the investigation is through the trial process. Indeed, he agreed that it is inappropriate for such information to be prematurely disclosed, rather than as evidence is made available by the parties through the litigation process. The only exception to his ruling related to information dealing with expert witnesses, which is not part of the investigatory file, wherein he ordered that the parties exchange that information should it exist.

Administrative Law Judge Anderson's ruling demonstrates why the disclosure of information to the Committee prior to the time when it is appropriate for the parties to have it, and for him to consider it, risks harm to the right of the parties to a fair trial. Consistent with this, I reiterate my offer to provide you with all record evidence, including Administrative Law Judge Anderson's rulings, as it becomes available. Further, as you know, under the rules of the House of Representatives, any document that we produced to the Committee is a "committee record."<sup>13</sup> As such, each Member of the House of Representatives has a right to access those documents. For all practical purposes, documents that Administrative Law Judge Anderson has ruled should not be available to the parties at this time would therefore be exposed to all 435 Members of the House of Representatives should we prematurely produce them pursuant to your request. No assurances have been given that all Members with access to these documents will keep them confidential, consistent with Administrative Law Judge

---

<sup>13</sup> Rules of the House of Representatives, Rule XI, clause 2, § 794(e)(2)(A).

Anderson's ruling. Any disclosure of this information would undermine the due process rights of the litigants, the administrative law judge's ability to effectively preside over the case, and the integrity of the hearing now under way.

For the reasons outlined above, I respectfully request that you reconsider your decision not to apply your June 17 ruling to our ongoing production of documents to the Committee. To be clear, allowing us to produce documents to the Committee consistent with your June 17 ruling does not mean that the Committee will not have access to the documents it seeks. Rather, it means that the Committee will have access to the requested information contemporaneously with its availability to the parties in the pending litigation. On the other hand, the issuance of a subpoena in an attempt to obtain the requested documents of an open and ongoing enforcement proceeding would severely undermine the integrity of the ongoing legal proceeding and cause serious damage to the due process rights of the parties to that proceeding.

If you have other specific questions about the case, we would be happy to work with you to accommodate your legitimate needs without compromising our mutual interest in preserving the rights of the parties. Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700, if you wish to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Lafe E. Solomon". The signature is fluid and cursive, with the first name "Lafe" being more prominent.

Lafe E. Solomon  
Acting General Counsel

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

<sup>1</sup> *ibid.*, 11, 819-822, 823.

（4）由图可知，在 0 到 10 秒内，物体做匀加速运动，加速度为  $a = 1 \text{ m/s}^2$ ，10 秒末的速度为  $v = 10 \text{ m/s}$ ，10 秒末的位移为  $s = 50 \text{ m}$ 。

<sup>4</sup> CRS Report 95-464, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, by Morton Rosenberg.

you at the hearing, should be extended to the Committee's document request.<sup>5</sup> The ruling you reference was specifically for the purposes of questioning at the hearing, and it does not extend to the document request.

I appreciate the seriousness you give to the due process rights of litigants. As I have previously expressed to you, I too respect these rights. However, it has been recognized that the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."<sup>6</sup> Moreover, there is no legal authority to support your position that the transmission of documents or information to this Committee violates these rights,<sup>7</sup> and your reliance on *ATX Inc. v. U.S. Department of Transportation*,<sup>8</sup> to stand for that proposition is misplaced. The facts of that case are not related to a document request by a congressional committee. Instead, the facts concern letters sent from Members of Congress to the Secretary of Transportation that asked the Secretary to deny an applicant's petition to operate an airline.<sup>9</sup> The facts also involve the testimony of a Member of Congress before an Administrative Law Judge that expressed the same position regarding the petition.<sup>10</sup> The court held that those facts neither "created an appearance of impropriety nor actually affected the outcome of the agency action at issue."<sup>11</sup> The court discussed that "the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision-making process."<sup>12</sup> Here, the Committee is concerned with what transpired *before* the Complaint was filed; receipt of such documents does not affect a decision-making process.

Deliberative process privilege can permit government agencies to withhold documents related to agency policies *from the courts*. Federal agencies also attempt to cite it as a reason to withhold documents from Congress. However, the D.C. Circuit has held that deliberative process privilege is a common law privilege that can be overcome by a showing of need.<sup>13</sup> Here, in order to fulfill the Committee's constitutional obligation to conduct oversight to determine whether the NLRB is properly carrying out its mandate under the NLRA and, in turn, using taxpayer dollars appropriately, the Committee needs all the documents requested. Further, any concern that documents provided to the Committee will waive a future claim of privilege is unwarranted. For example, in *Murphy v. Department of the Army*,<sup>14</sup> the court held that a memorandum withheld by the

<sup>5</sup> See Letter from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (June 29, 2011).

<sup>6</sup> *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964 (5th Cir. 1966).

<sup>7</sup> See CRS Memorandum, *Application of Pillsbury Doctrine to Congressional Oversight Inquires*, by Todd Tatelman (May 2011).

<sup>8</sup> *ATX, Inc. v. U.S. Dept. of Transp.*, 41 F.3d 1522 (D.C. Cir. 1994).

<sup>9</sup> *Id.* at 1524-26.

<sup>10</sup> *Id.* at 1524.

<sup>11</sup> *Id.* at 1527.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *In re Sealed Case (Espy)*, 121 F.3d 729 (D.C. Cir. 1997).

<sup>14</sup> *Murphy v. Dep't of Army*, 613 F.2d 1151, 1159 (D.C. Cir. 1979).

Department of Army from the plaintiff did not lose its deliberative process privilege by reason of its disclosure to a Member of Congress, even absent an express understanding that the document would remain confidential.

Attorney-client privilege is a judicially-developed policy intended to foster client confidence and encourage full disclosure to an attorney in anticipation of an adversarial setting.<sup>15</sup> However, the need to protect this interest in an investigative setting where a congressional committee is not adjudicating the liberty or property interests of a witness is less compelling.<sup>16</sup> Accordingly, courts have recognized that "only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding."<sup>17</sup> Therefore, attorney-client privilege claims can be overcome by Congress.

Finally, the claim that these materials are privileged attorney work product is also unsubstantiated. Work product claims are invoked by parties in a litigation proceeding.<sup>18</sup> As a congressional committee conducting oversight, the Committee is not involved in such a proceeding. Further, courts have recognized that work product is a qualified privilege which may also be defeated by a sufficient showing of need.<sup>19</sup>

The concept that the investigative power of the legislative branch of government is bound by non-constitutional, common law rules developed by the judicial branch is contrary to the concept of separation of powers.<sup>20</sup> As there is no basis to withhold the outstanding documents, I again request the following documents and information for the time period from January 1, 2009 to present:

- 1) All documents and communications referring or relating to the Office of General Counsel's investigation of Boeing, including but not limited to all communications between the Office of General Counsel and the National Labor Relations Board. To clarify, this would include, but is not limited to, all documents and communications between anyone in the Executive Office of the President, other federal agencies, or Member of Congress and the Office of General Counsel or the National Labor Relations Board referring or relating to the International Association of Machinists charge against Boeing or the Office of General Counsel's investigation of Boeing.

---

<sup>15</sup> CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.

<sup>16</sup> *Id.*

<sup>17</sup> *Hannah v. Larche*, 363 U.S. 420, 445 (1960).

<sup>18</sup> Fed. Rules Civ. Pro. 26(b)(3).

<sup>19</sup> See *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968).

<sup>20</sup> CRS Report 95-464, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, by Morton Rosenberg.



Mr. Lafe Solomon  
July 12, 2011  
Page 4

- 2) All documents, including emails and call logs, and communications between anyone in the Office of General Counsel or the National Labor Relations Board and the International Association of Machinists.
- 3) All documents, including emails and call logs, and communications between the Office of General Counsel or the National Labor Relations Board and any representative(s) of the Boeing Company.

If the entirety of the documents requested are not received by 5:00 p.m. on July 26, 2011, the Committee will be required to consider the use of the compulsory process. When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Kristina Moore or Kristin Nelson of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman

Enclosure

Cc: The Honorable Elijah E. Cummings, Ranking Member

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

### COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

Majority (2021 225-5074)  
Minority (2021 225-5051)

#### **Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

July 11, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa:

I write in response to your June 27, 2011 letter regarding an additional question for the June 17, 2011 hearing record. Specifically, the question from Congressman Ross is:

29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in this case claim that if the remedy requested in the Complaint is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?

In response, I affirm my belief, with which the administrative law judge and the Board agreed, that the putative employee intervenors have no legally cognizable interest in the instant case that would warrant full intervenor status. This in no way prevents the parties from calling any of these employees as witnesses to provide relevant testimony during the Boeing proceeding before the administrative law judge, nor does it preclude these employees from filing a post-hearing brief.

The employees stated that they sought to intervene to oppose the complaint and the requested remedy. This is the exact same ultimate objective as Boeing, their employer. As a matter of law, it must be presumed that their interests will be adequately represented, and, in fact, there is a presumption of adequacy of representation when the intervenor has the same ultimate objective as an existing

party. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 (9<sup>th</sup> Cir. 1997). Thus, their presence as intervenors at the hearing is not necessary in order to enable the Board to determine whether Boeing has violated the statute or to make an appropriate order against Boeing.

As to the remedy, to the extent that these employees assert that their interest in the proceeding is based on their belief that the remedy sought will cause their discharges, such speculation does not justify their intervention as nothing in the complaint requires Boeing to shut down any of its operations in South Carolina and they cannot and do not know what business decisions Boeing will make if the remedy sought is granted. Moreover, it is well settled that employees do not have any protectable interest in positions that they may have obtained due to unlawful employment decisions. *Donnelly v. Glickman*, 159 F3d 405, 411 (9<sup>th</sup> Cir. 1998), citing *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9<sup>th</sup> Cir. 1981). Additionally, I note that two of the three employees are not even assigned to work on the second 787 production line at issue in this case and they have not advanced any factual basis for believing that the remedy will affect their positions in the facilities where they do work. Lastly, the remedy sought does not interfere with their Section 7 right to elect not to be represented by a union.

In summary, full intervenor status, which would require participation of these employees as additional parties in this complex case, is not necessary, creates procedural burdens, and adds to the parties' litigation costs.

If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,



Lafe E. Solomon  
Acting General Counsel

cc: The Honorable Dennis Ross, Chairman  
Subcommittee on Federal Workforce, U.S. Postal  
Service and Labor Policy

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

DENISE R. BATES, IOWA  
JAMES A. BROWN, IOWA  
CHRISTOPHER W. CLAY, PENNSYLVANIA  
MICHAEL W. TURNER, OHIO  
PATRICK M. HENRY, NORTH CAROLINA  
BOB BORDEN, OHIO  
JASON CHAFFETZ, UTAH  
JONNY MARK, GEORGIA  
TIM WISBERG, MICHIGAN  
JAMES FARRINGTON, OKLAHOMA  
JUSTIN AMANN, MICHIGAN  
AMY MARK, RHODE ISLAND  
DALE A. JOSEPH, ARIZONA  
KYLE R. LEROUX, IOWA  
PATRICK MITCHELL, PENNSYLVANIA  
STACEY LARSEN, MISSISSIPPI  
JIM WALSH, IOWA  
REX GOWDY, SOUTH CAROLINA  
DENNIS A. ROSS, FLORIDA  
FRANK J. GONZA, NEW HAMPSHIRE  
MARK FARENTHOLD, TEXAS  
MARK KELLY, PENNSYLVANIA

DAVID M. J. BRADY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

PHONE: (202) 225-6143  
FAX: (202) 225-6144  
WWW: www.house.gov

JOHN F. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA

JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA  
JOHN A. MCCARTHY, CALIFORNIA

June 27, 2011

201 JUN -1 A 10 41

Mr. Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20570-0001

Dear Mr. Solomon:

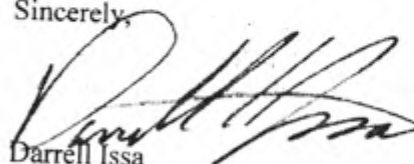
Thank you for appearing before the Committee on Oversight and Government Reform on June 17, 2011, at the hearing entitled, "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise." We appreciate the time and effort you gave as a witness before the Committee.

Pursuant to the Chairman's directions, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from Representative Dennis Ross, a member of the Committee. In preparing your answers to these questions, please address your response to the Member who has submitted the question and include the text of the Member's question along with your response.

Please provide your response to these questions by July 11, 2011. Your response should be addressed to the Committee office at 2157 Rayburn House Office Building, Washington, DC 20515. Please also send an electronic version of your response by e-mail to Michael Bebeau, Assistant Clerk, at [Michael.Bebeau@mail.house.gov](mailto:Michael.Bebeau@mail.house.gov) in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Kristina Moore or Kristin Nelson at (202) 225-5074.

Sincerely,

  
Darrell Issa  
Chairman

Attachment

**Questions for Mr. Lafe E. Solomon**  
Acting General Counsel  
National Labor Relations Board

**Representative Dennis Ross**  
Committee on Oversight and Government Reform

**Hearing on "Unionization Through Regulation:  
The NLRB's Holding Pattern on Free Enterprise."**

---

- 1) 29 CFR 102.29 allows any person who wishes to intervene in a proceeding before the NLRB to file a motion to intervene. Section 10388.1 of the NLRB Caschandling Manual, Part One, Unfair Labor Practice Proceedings, states that the "Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding." As you know, the parties that moved to intervene in the case claim that if the remedy requested in the Compliant is granted they will be "discharge[d] from employment;" therefore, they have a "direct" interest in the outcome of the case. Please provide an explanation of why you believe that the risk of job loss does not amount to a "direct interest in the outcome" of the NLRB's proceeding against Boeing. Since you do not oppose these same parties filing post-hearing briefs, why should they be forced to wait until the hearing has concluded to express their concerns?



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

June 29, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

The Honorable Dennis Ross, Chairman  
Subcommittee on Federal Workforce, U.S.  
Postal Service and Labor Policy  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

The Honorable Trey Gowdy, Chairman  
Subcommittee on Health Care, District of Columbia,  
Census and the National Archives  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa, Chairman Ross, and Chairman Gowdy:

This letter serves as my continuing response to your May 12, 2011 request for documents related to the Boeing hearing now pending before an administrative law judge in Seattle, Washington. In that regard, I am enclosing a CD containing documents relating to communications between the Office of the General Counsel and the International Association of Machinists or the Boeing Company that I believe specifically address your immediate articulated concerns.

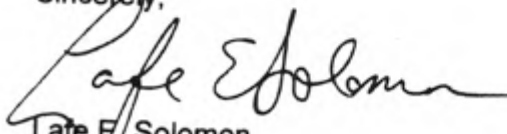
Further, during the South Carolina field hearing held by the full Committee on Oversight and Government Reform on June 17, 2011, you ruled that it would be appropriate for me to disclose, through my testimony, only discoverable information related to the Boeing administrative hearing. Your ruling strikes an appropriate and fair balance between the Committee's legitimate informational needs and the Agency's legitimate needs to secure the due process rights of the parties to a fair trial.



I believe that extending the application of your ruling to the document request would continue to ensure fairness to the litigants. The production of documentary information exchanged by the parties at the Boeing administrative hearing to the Committee will appropriately protect the due process rights of the parties to a fair trial and will provide a detailed accounting of the exact nature of the case, the facts proffered in support and rebuttal, and the precise precedent invoked and relied upon. On the other hand, the premature disclosure of information not yet available to the parties to the proceeding could seriously compromise the litigation and result in an unfair advantage to one litigant over another.

I trust that you will agree that your ruling on June 17, 2011 at the South Carolina field hearing continues to strike the appropriate balance between both of our legitimate needs. If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,



Lyle E. Solomon  
Acting General Counsel

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

The Honorable Stephen Lynch, Ranking Minority Member  
Subcommittee on Federal Workforce, U.S. Postal Service & Labor Policy

The Honorable Danny Davis, Ranking Minority Member  
Subcommittee on Health Care, District of Columbia, Census and the National  
Archives



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

June 24, 2011

The Honorable Michael B. Enzi  
Ranking Minority Member  
Committee on Health, Education,  
Labor and Pensions  
United States Senate  
Washington, DC 20510-6300

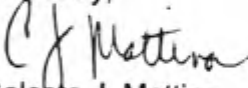
Dear Senator Enzi:

Your letter of June 16, 2011, addressed to the Chairman of the National Labor Relations Board, Wilma Liebman, requesting an explanation of the legal authority for the appointment of Acting General Counsel Lafe Solomon, has been referred to me for response. As you know, Chairman Liebman did not appoint Acting General Counsel Lafe Solomon, nor does she exercise supervisory authority over him.

In its Answer to the NLRB's Complaint in the Boeing Company and International Association of Machinists and Aerospace Workers, Case 19-CA-32431, Respondent, The Boeing Company, asserted as an affirmative defense that the Acting General Counsel did not lawfully hold his office at the time the Complaint was filed. The Acting General Counsel responded to this defense in a Motion to Strike Respondent's Fourteenth Affirmative Defense filed with the Administrative Law Judge on June 21, 2011. I respectfully refer you to pages 4-7 of that motion for a discussion of the authority under which Acting General Counsel Lafe Solomon was appointed. A copy of a memorandum from the President to Acting General Counsel Lafe Solomon, dated June 18, 2010, notifying him of the appointment, which you also requested, is an exhibit to the motion.

If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,

  
Celeste J. Mattina  
Acting Deputy General Counsel

cc: The Honorable Kathryn H. Ruemmler, White House Counsel  
The Honorable Gene L. Dodaro, Comptroller General

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**THE BOEING COMPANY**

**and**

**Case 19-CA-32431**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO STRIKE  
RESPONDENT'S FOURTEENTH AFFIRMATIVE DEFENSE AND  
RESPONSE TO ADMINISTRATIVE LAW JUDGE'S SOLICITATION OF  
THE PARTIES' POSITIONS CONCERNING THAT DEFENSE**

Pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board (the "Board"), Counsel for the Acting General Counsel moves to strike the fourteenth affirmative defense advanced by Respondent The Boeing Company ("Respondent") in its Answer to the Complaint in this matter ("Answer"). With neither an articulated theory nor supporting facts, Respondent baldly asserts that "[t]he Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed." (Answer at 4, ¶ 14). Counsel for the Acting General Counsel respectfully requests that Administrative Law Judge Anderson strike Respondent's defense because it fails to either give the Acting General Counsel fair notice of the nature of the defense or set forth sufficient facts to plausibly support a claim for relief.

Further, in response to Administrative Law Judge Anderson's solicitation of the parties' positions regarding Respondent's fourteenth affirmative defense,<sup>1</sup> Counsel for the Acting General Counsel respectfully avers that, even if Respondent's defense were not defective on its face, it would be inappropriate for Administrative Law Judge Anderson to rule on the propriety of President Obama's appointment of the Acting General Counsel. Respondent has proffered nothing to suggest that the appointment of the Acting General Counsel was in any way improper; thus, the presumption of regularity applies.

**I. Respondent's Fourteenth Affirmative Defense is Inadequately Pled**

Affirmative defenses are insufficiently pled if they do not provide fair notice of the nature of the defense. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). The standard used to assess sufficiency of the pleading was set forth by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007): does the pleading set forth "enough facts to state a claim to relief that is plausible on its face"? See *Hudson v. First Transit, Inc.* 2011 WL 445683, slip op. at \*2 (N.D. Cal. Feb. 3, 2011).

Although, as the Administrative Law Judge has noted, Respondent's claim concerning the authority of the Acting General Counsel goes to the very viability of the Complaint,<sup>2</sup> Respondent has not articulated any basis for its assertion in either its affirmative defense or its pending Motion to Dismiss. Likewise, Respondent did not

---

<sup>1</sup> (Tr., Day 1, 28:5-12). References to the transcript are as produced in rough copies delivered daily and referenced by "Day \_\_\_\_," rather than the standard format for official certified transcripts, which will be generated in due course.

<sup>2</sup> (Tr., Day 1, 26:18-22; 43:16-23).

move the Board for summary judgment before the hearing under Rule 102.24(b) of the Board's Rules and Regulations and has stated that it has no plans "to make a motion with regard to the authority of the General Counsel." (Tr., Day 1, 26:10-12). Rather, Respondent has indicated that it wishes to await the Acting General Counsel's response to its unsubstantiated defense before even setting forth the basis for that asserted defense. (Tr., Day 1, 47:14-18). Thus, Respondent has never articulated any basis for its claim.

As such, Respondent's Answer does not and cannot remotely be considered to provide fair notice of the nature of its defense, or to set forth, as required, "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570, *cited in Hudson v. First Translt, Inc.* 2011 WL 445683, slip op. at \*2 (granting motion to strike certain affirmative defenses). *See also South Coast Refuse Corp.*, 337 NLRB 841, 842 (2002) (striking respondent's baseless affirmative defense challenging General Counsel's authority to seek specific relief).

While motions to strike are "generally disfavored because the motions may be used as delaying tactics and because of the strong policy favoring resolution on the merits," such is not the case here. *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010), *cited in Seals v. Mitchell* 2010 WL 5094264, slip op. at \*2 (N.D. Cal. Dec. 8, 2010). Rather, the circumstances are such that, as Administrative Law Judge Anderson has effectively noted, it "will streamline the ultimate resolution of the matter." *Federal Sav. and Loan Ins. Corp. v. Gemini Mgt.*, 921 F.2d 241, 244 (9th Cir. 1990). Counsel for the Acting General

Counsel therefore respectfully requests that the Administrative Law Judge strike Respondent's fourteenth affirmative defense as inadequately pled.

**II. Even If Respondent's Fourteenth Affirmative Defense Were Adequately Pled, a Hearing on the Merits of This Case Must Proceed**

As explained below, Counsel for the Acting General Counsel respectfully avers that, even if Respondent's defense were adequately pled, it would be inappropriate for Administrative Law Judge Anderson to either rule on the propriety of President Obama's appointment of the Acting General Counsel or halt the proceedings merely upon this Motion, as Respondent has proffered nothing to suggest that the appointment of the Acting General Counsel was improper.

The Board has found that it is not appropriate for it to decide, in an unfair labor practice case, whether or not the President made a proper appointment of an Acting General Counsel under the Federal Vacancies Reform Act of 1998 (the "FVRA"), 5 U.S.C. §§ 3345-3349. *Lutheran Home at Moorestown*, 334 NLRB 340, 340 (2001). In deciding whether to proceed with the disposition of a case on the merits, notwithstanding a claim concerning the Acting General Counsel's authority, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB at 341, citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). See also *Anderson v. P.W. Madsen Inv. Co.*, 72 F.2d 768, 771 (10th Cir. 1934) ("There is a presumption of authority for official action rather than want of authority ..."). Given this presumption, the Board will proceed with the disposition of a case on its merits, notwithstanding claims concerning the authority of an Acting General Counsel,



so long as there is nothing to suggest that the Acting General Counsel's appointment was "clearly improper." *Lutheran Home at Moorestown*, 334 NLRB at 340.

Under such precedent,<sup>3</sup> Counsel for the Acting General Counsel submits that, even if Respondent's claim concerning the Acting General Counsel's authority were adequately pled, it would be inappropriate for the Administrative Law Judge to rule on the propriety of President Obama's appointment of the Acting General Counsel in this unfair labor practice case. Rather, the Administrative Law Judge should proceed with a hearing on the merits of this case because there is nothing to suggest any impropriety in President Obama's appointment of the Acting General Counsel.

President Barack Obama appointed Lafe Solomon to the position of Acting General Counsel effective Monday, June 21, 2010, following the resignation of the previous General Counsel, Ronald Meisburg (Exhibit A attached). The President appointed Mr. Solomon pursuant to "the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998 ....., "<sup>4</sup> which provides in relevant part:

(a) If an officer of an Executive agency ... whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, ... resigns ...

(3) ... the President ... may direct an officer or employee of such Executive agency to perform the

<sup>3</sup> To the extent Article III courts have applied the FVRA to the Board, they have found no impropriety in a Deputy General Counsel's serving as General Counsel temporarily in an acting capacity pursuant to § 3345(a)(1) of the FVRA. See, e.g., *Muffley v. Mammoth Coal Co.*, 570 F.3d 534, 540, n.1 (4th Cir. 2009); *Muffley v. Massey Energy Co.*, 547 F. Supp.2d 536, 540 (S.D. W.Va. 2008).

<sup>4</sup> Mr. Solomon is the third Acting General Counsel of the Board to be appointed pursuant to such authority. President Clinton's December 19, 2000, appointment of Acting General Counsel Leonard Page and President Bush's July 1, 2005, appointment of Acting General Counsel Arthur F. Rosenfeld were made pursuant to the same authority.

functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of ... resignation, ... the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

By its terms, 5 U.S.C. § 3345 applies to all appointments where advice and consent of the Senate is required (with four enumerated exceptions, which have no bearing in this matter). 5 U.S.C. § 3345(a). Thus, § 3345 applies to the Board and authorizes the President to appoint an officer or employee of the Board to serve as the Acting General Counsel. Revision of Statement of Organization and Functions; Position of Deputy General Counsel, 66 Fed. Reg. 63,416-17 (Dec. 6, 2001). A person serving as an acting officer may serve "for no longer than 210 days after the vacancy occurs," or, absent rejection, withdrawal, or return of a Senate nomination, as long as a first or second Senate nomination is pending. 5 U.S.C. § 3346.

Section 3347(a)(1)(A) of the FVRA preserves § 3(d) of the National Labor Relations Act, 29 U.S.C. § 153(d), as an alternate avenue for appointment of an Acting General Counsel. See also S. Rep. No. 105-250, 105th Cong. 2d Sess. 17 (1998) ("even with respect to the specific positions in which temporary officers may serve under the specific statutes this bill retains, the Vacancies Act would continue to provide an alternate procedure for temporarily occupying the office"). Thus, the President has the

option of appointing an Acting General Counsel pursuant to either § 3345(a) of the FVRA or § 3(d) of the Act.<sup>5</sup>

In accordance with these requirements, President Obama submitted his nomination of Mr. Solomon to serve as General Counsel to the Senate on January 5, 2011. 157 Cong. Rec. S68 (Jan. 5, 2011). While Mr. Solomon's nomination remains pending before the Senate, he continues to serve as the Board's Acting General Counsel, a job for which he is unquestionably qualified under § 3345(a) of the FVRA due to his current employment, longevity, and pay grade. Specifically, for the 10 years preceding his appointment as Acting General Counsel, Mr. Solomon, who began his career with the Board in 1972, served in the position of Director of the Board's Office of Representation Appeals, a Senior Executive Service position. Mr. Solomon's service as Acting General Counsel also falls squarely within the time limitations set forth in § 3346, as he served as Acting General Counsel for fewer than 210 days before his nomination on January 5, 2011, and his nomination remains pending before the Senate. Thus, there is nothing raising the spectre of clear impropriety vis-à-vis Mr. Solomon's appointment, and the presumption of regularity applies as the case moves forward.

### III. Conclusion

For the reasons set forth above, Counsel for the Acting General Counsel moves to strike Respondent's fourteenth affirmative defense as inadequately pled. Counsel for the Acting General Counsel further respectfully avers that even if that defense were

---

<sup>5</sup> Section 3(d) of the NLRA provides in relevant part:

In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

adequately pled, a hearing on the merits of this case must proceed because there is nothing to suggest that the appointment of the Acting General Counsel was clearly improper.

Respectfully submitted on this 21<sup>st</sup> day of June, 2011.

A handwritten signature in black ink, appearing to read 'Mara-Louise Anzalone', written over a horizontal line.

Mara-Louise Anzalone  
Peter G. Finch  
Rachel Harvey  
Counsel for the Acting General Counsel  
National Labor Relations Board - Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174  
Telephone: 206.220.6301  
Facsimile: 206.220.6305  
Email: mara-louise.anzalone@nlr.gov  
peter.finch@nlr.gov  
rachel.harvey@nlr.gov

THE WHITE HOUSE  
WASHINGTON

June 18, 2010

MEMORANDUM FOR LAFE E. SOLOMON

Director, Office of Representation Appeals,  
National Labor Relations Board

Pursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998, you are directed to perform the duties of the office of, General Counsel of the National Labor Relations Board, effective June 21, 2010.

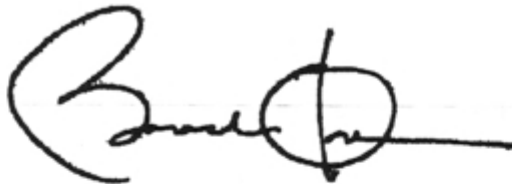
A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish on the left and a horizontal line extending to the right.

Exhibit A

## CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Motion to Strike Respondent's Fourteenth Affirmative Defense and Response to Administrative Law Judge's Solicitation of the Parties' Positions Concerning that Defense was served on the 21<sup>st</sup> day of June, 2011, on the following parties:

### E-File:

The Honorable Clifford H. Anderson  
Administrative Law Judge  
National Labor Relations Board, Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### E-mail:

Richard B. Hankins, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[rhankins@mckennalong.com](mailto:rhankins@mckennalong.com)

Drew E. Lunt, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[dlunt@mckennalong.com](mailto:dlunt@mckennalong.com)

William J. Kilberg, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[wkilberg@gibsondunn.com](mailto:wkilberg@gibsondunn.com)

Alston D. Cornell, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[acornell@mckennalong.com](mailto:acornell@mckennalong.com)

Eugene Scalla, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[escalla@gibsondunn.com](mailto:escalla@gibsondunn.com)

Matthew D. McGill, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[mmcgill@gibsondunn.com](mailto:mmcgill@gibsondunn.com)

Paul Blankenstein, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[pblankenstein@gibsondunn.com](mailto:pblankenstein@gibsondunn.com)

Daniel J. Davis, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[ddavis@gibsondunn.com](mailto:ddavis@gibsondunn.com)



David Campbell, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Campbell@workerlaw.com](mailto:Campbell@workerlaw.com)

Carson Glickman-Flora, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Flora@workerlaw.com](mailto:Flora@workerlaw.com)

Robert H. Lavitt, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Lavitt@workerlaw.com](mailto:Lavitt@workerlaw.com)

Jennifer Robbins, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Robbins@workerlaw.com](mailto:Robbins@workerlaw.com)

**U.S. Mail:**

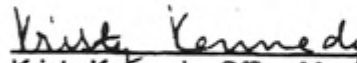
Douglas P. Kight, Attorney  
The Boeing Company  
P.O. Box 3707, MS 13-08  
Seattle, WA 98124-2207

Machinists District Lodge 751  
9135 15<sup>th</sup> Pl. S.  
Seattle, WA 98108-5100

Sean Leonard, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[leonard@workerlaw.com](mailto:leonard@workerlaw.com)

Jude Bryan, Paralegal  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[bryan@workerlaw.com](mailto:bryan@workerlaw.com)

Christopher Corson, General Counsel  
IAM  
9000 Machinists Pl.  
Upper Marlboro, MD 20772-2687  
[ccorson@iamaw.org](mailto:ccorson@iamaw.org)

  
Kristy Kennedy, Office Manager

United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
AGING AND PENSIONS

WASHINGTON, DC 20510-6700

June 16, 2011

The Honorable Wilma Liebman  
Chairman  
National Labor Relations Board  
1099 14th St. N.W.  
Washington, D.C. 20570-0001

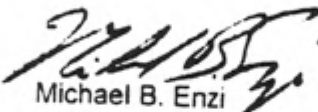
Dear Chairman Liebman,

I write to request an explanation of the legal authority allowing the Board's general counsel to serve in an acting capacity beyond the period allowed by the National Labor Relations Act.

As you know, under the NLRA, a presidentially designated acting general counsel can only serve for forty days when Congress is in session unless a nomination is made. Mr. Solomon has served in an acting capacity since approximately June 20, 2010, which appears to encompass more than forty session days, but his nomination was not submitted until January 5, 2011. I would, therefore, like you to clarify under what legal authority he has been serving as acting general counsel (e.g., the Vacancies Reform Act) and a copy of all documents reflecting that authority, including any presidential designation sent to the Board.

I look forward to your response, and would appreciate receiving this information by June 24, 2011. If you have questions and are unable to reach me, please have your staff contact the Republican HELP Committee Staff Director Frank Macchiarola at 224-6770.

Sincerely,

  
Michael B. Enzi  
U.S. Senator

cc: Robert Bauer, White House Counsel  
The Honorable Gene L. Dodaro, Comptroller General



Home • Briefing Room • Statements & Releases

Search WhiteHouse.gov

Search

## The White House

Office of the Press Secretary

For Immediate Release

June 02, 2011

### President Obama Announces New White House Counsel Kathryn Ruemmler

Washington, DC – Today, June 2nd, the White House announced that White House Counsel Bob Bauer will return to private practice and that current Principal Deputy Counsel to the President Kathryn Ruemmler will serve as White House Counsel.

"Bob is a good friend and has served as a trusted advisor for many years," said President Obama. "Bob was a critical member of the White House team. He has exceptional judgment, wisdom, and intellect, and he will continue to be one of my close advisors."

At the end of June, Bauer will return to Perkins Cole where he will resume his practice focused on serving as general counsel to the President's reelection campaign, general counsel to the Democratic National Committee, and personal lawyer to President Obama.

"Kathy is an outstanding lawyer with impeccable judgment," said President Obama. "Together, Bob and Kathy have led the White House Counsel's office, and Kathy will assure that it continues to successfully manage its wide variety of responsibilities."

Kathryn Ruemmler currently serves as the Principal Deputy Counsel to the President and has served as Bob Bauer's deputy since January of 2010. Ruemmler joined the Obama Administration in January of 2009 as the Principal Associate Deputy Attorney General at the United States Department of Justice.

Ruemmler was a litigation partner in the Washington, D.C. office of Latham & Watkins from 2007 to 2009. Prior to Latham, Ruemmler served as a federal prosecutor for six years, where she was a co-lead prosecutor in the successful prosecution of the former CEOs of Enron. Ruemmler received the Attorney General's Award for Exceptional Service for her work on the Enron investigation.

From 2000 to 2001, Ms. Ruemmler served as Associate Counsel to President Bill Clinton. Ruemmler received her J.D. from Georgetown University Law Center where she was Editor-in-Chief of the Georgetown Law Journal, and her B.A. cum laude with distinction in English from the University of Washington. She clerked for the Honorable Timothy K. Lewis on the U.S. Court of Appeals for the Third Circuit.

WWW.WHITEHOUSE.GOV

En español | Accessibility | Copyright Information | Privacy Policy | Contact  
USA.gov | Subscribe to RSS Feeds | Apply for a Job

## BLOG POSTS ON THIS ISSUE

June 23, 2011 2:51 PM EDT

"The Most Moving Part of My Trip So Far":  
The First Lady on Meeting Nelson Mandela  
in South Africa

First Lady Michelle Obama speaks to young  
African leaders about meeting Nelson Mandela in  
South Africa.

June 23, 2011 1:42 PM EDT

Inspiration for a Future Free of HIV  
First Lady Michelle Obama meets with  
organizations dedicated to combating HIV/AIDS in  
South Africa, including groups that use soccer to  
convene and educate children about HIV/AIDS.

June 23, 2011 12:07 PM EDT

Pittsburgh Leaders Promote Advanced  
Manufacturing  
Pittsburgh's leaders give us a preview of what  
makes the manufacturing industry in Pittsburgh  
special.

## VIEW ALL RELATED BLOG POSTS >

## STAY CONNECTED

Facebook | Twitter | YouTube

Twitter | Vimeo

Flickr | iTunes

MySpace | LinkedIn



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

June 24, 2011

The Honorable Denny Rehberg, Chairman  
House Appropriations Committee  
Subcommittee on Labor, Health and Human  
Services, Education and Related Agencies  
House of Representatives  
2448 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Rehberg,

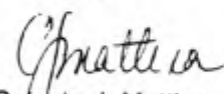
I write in response to your June 6, 2011 letter to National Labor Relations Board Acting General Counsel Lafe E. Solomon, regarding the hearing now pending before an administrative law judge that will determine whether The Boeing Company ("Boeing") engaged in certain discriminatory behavior.

With all due respect, we do not agree with the various factual assertions contained within your letter. In that regard, I direct you to the basic facts and legal theory of the Acting General Counsel's case, which are contained in the Boeing complaint and the Acting General Counsel's Opposition to Respondent's Motion to Dismiss & Strike ("Acting General Counsel's Opposition"). Both of these documents are enclosed with this letter. To assist you in your review of the enclosed information, I note that the Acting General Counsel's Opposition also contains legal precedent relevant to the complaint.

In addition to the aforementioned documents, we would be happy to provide you with copies of the transcript and exhibits from the public hearing contemporaneous with their availability, as well as the post-hearing briefs once they are filed. The transcript and exhibits will provide a detailed accounting of the exact nature of the case and the facts proffered in support and rebuttal, which frame the basis for all legal arguments. The briefs will further detail the precise precedent invoked and relied upon.

We trust that the information provided sufficiently addresses your questions about precedent. If you have further questions, please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-3700.

Sincerely,

  
Celeste J. Mattina  
Acting Deputy General Counsel

Enclosures

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS

**COMPLAINT AND NOTICE OF HEARING**

International Association of Machinists and Aerospace Workers District Lodge No. 751 ("Local 751" or the "Union"), affiliated with International Association of Machinists and Aerospace Workers ("IAM"), has charged in Case 19-CA-32431 that The Boeing Company ("Respondent" or "Boeing"), has been engaging in unfair labor practices as set forth in the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*

Based thereon, the Acting General Counsel of the National Labor Relations Board (the "Board"), by the undersigned, pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by the Union on March 26, 2010, and was served on Respondent by regular mail on or about March 29, 2010.

2.

(a) Respondent, a State of Delaware corporation with its headquarters in Chicago, Illinois, manufactures and produces military and commercial aircraft at various facilities throughout the United States, including in Everett, Washington (the "facility"), and others in the Seattle, Washington, and Portland, Oregon, metropolitan areas.

(b) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), both sold and shipped from, and purchased and received at, the facility goods valued in excess of \$50,000 directly to and from points outside the State of Washington.

(d) Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

3.

The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of



§ 2(11) of the Act, and/or agents within the meaning of § 2(13) of the Act, acting on behalf of Respondent:

|               |   |                                                                                                                                                                       |
|---------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Jim Albaugh   | — | Executive Vice President, Boeing; President and CEO of Integrated Defense Systems (until late August 2009); CEO, Boeing Commercial Airplanes (as of late August 2009) |
| Scott Carson  | — | Executive Vice President, Boeing; CEO, Boeing Commercial Airplanes (until late August 2009)                                                                           |
| Ray Conner    | — | Vice President and General Manager of Supply Chain Management and Operations, Boeing Commercial Airplanes                                                             |
| Scott Fancher | — | Vice President and General Manager of the 787 Program                                                                                                                 |
| Fred Kiga     | — | Vice President, Government and Community Relations                                                                                                                    |
| Doug Kight    | — | Vice President, Human Resources, Boeing Commercial Airplanes                                                                                                          |
| Jim McNemey   | — | President, Chairman, and CEO                                                                                                                                          |
| Jim Proulx    | — | Boeing spokesman                                                                                                                                                      |
| Pat Shanahan  | — | Vice President and General Manager of Airplane Programs                                                                                                               |
| Gene Woloshyn | — | Vice President, Employee Relations                                                                                                                                    |

5.

(a) Those employees of Respondent enumerated in Section 1.1(a) of the collective bargaining agreement described below in paragraph 5(c), including, *inter alia*, all production and maintenance employees in Washington State, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Puget Sound Unit").

(b) Those employees of Respondent enumerated in Section 1.1(c) of the collective bargaining agreement described below in paragraph 5(c), including, *inter*

*alia*, all production and maintenance employees in the Portland, Oregon area, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Portland Unit").

(c) Since at least 1975 and at all material times, the IAM has been the designated exclusive collective bargaining representative of the Puget Sound Unit and the Portland Unit (collectively, the "Unit") and recognized as such representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 2, 2008, to September 8, 2012.

(d) Since 1975, during the course of the parties' collective-bargaining relationship, the IAM engaged in strikes in 1977, 1989, 1995, 2005, and 2008.

6.

On or about the dates and by the manner noted below, Respondent made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes:

(a) October 21, 2009, by McNerney in a quarterly earnings conference call that was posted on Boeing's intranet website for all employees and reported in the Seattle Post Intelligencer Aerospace News and quoted in the Seattle Times, made an extended statement regarding "diversifying [Respondent's] labor pool and labor relationship," and moving the 787 Dreamliner work to South Carolina due to "strikes happening every three to four years in Puget Sound."

(b) October 28, 2009, based on its October 28, 2009, memorandum entitled "787 Second Line, Questions and Answers for Managers," informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce Respondent's vulnerability to delivery disruptions caused by work stoppages.

(c) December 7, 2009, by Conner and Proulx in an article appearing in the Seattle Times, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(d) December 8, 2009, by Conner in an article appearing in the Puget Sound Business Journal, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(e) March 2, 2010, by Albaugh in a video-taped interview with a Seattle Times reporter, stated that Respondent decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.

7.

(a) In or about October 2009, on a date better known to Respondent, but no later than October 28, 2009, Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit to its non-union site in North Charleston, South Carolina.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 7(a), combined with the conduct described above in paragraph 6, is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

8.

(a) In or about October 2009, on a date better known to Respondent, but no later than December 3, 2009, Respondent decided to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit to its non-union facility in North Charleston, South Carolina, or to subcontractors.

(b) Respondent engaged in the conduct described above in paragraph 8(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 8(a), combined with the conduct described above in paragraphs 6 and 7(a), is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

9.

By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

10.

By the conduct described above in paragraphs 7 and 8, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(3) and (1) of the Act.

11.

By the conduct described above in paragraphs 6 through 10, Respondent has engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

12.

As part of the remedy for the unfair labor practices alleged herein, the Acting General Counsel seeks an Order requiring either that one of the high level officials of Respondent alleged to have committed the violations enumerated above in paragraph 6 read, or that a designated Board agent read in the presence of a high level Boeing official, any notice that issues in this matter, and requiring Respondent to broadcast such reading on Respondent's intranet to all employees.

13.

(a) As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent

to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities.

(b) Other than as set forth in paragraph 13(a) above, the relief requested by the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to this Complaint. The answer must be **received by this office on or before May 4, 2011, or postmarked on or before May 3, 2011.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at **[www.nlr.gov](http://www.nlr.gov)**, click on ***File Case Documents***, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due



date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in this Complaint are true.

#### **NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on the 14<sup>th</sup> day of June, 2011, at 9:00 a.m., in James C. Sand Hearing Room, 2966 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in

this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

**DATED** at Seattle, Washington, this 20<sup>th</sup> day of April, 2011.

A handwritten signature in dark ink, appearing to read "Richard L. Ahearn", is written over a horizontal line.

Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174-1078

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO  
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

*(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)*

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8½ by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**NOTICE**

The Boeing Company  
Case: 19-CA-32431

20 April 2011

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 C.F.R. 102.16(a) or with the Division of Judges when appropriate under 29 C.F.R. 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Certified Mail: 7006 3450 0001 6746 5471

Regular Mail:

THE BOEING COMPANY  
Attn: Douglas P. Kight, Attorney  
PO Box 3707, MS 13-08  
Seattle, WA 98124-2207

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS DISTRICT  
LODGE 751  
Attn: Jesse Cote, Business Agent  
9135 15<sup>th</sup> PI S  
Seattle, WA 98108-5100

Regular Mail:

WILLIAM J. KILBERG, ATTORNEY  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Ave, NW  
Washington, DC 20036-5306  
Email: [wkilberg@givsondunn.com](mailto:wkilberg@givsondunn.com)

DAVID CAMPBELL, ATTORNEY  
SCHWERIN CAMPBELL BARNARD IGLITZIN &  
LAVITT LLP  
18 W Mercer St, Suite 400  
Seattle, WA 98119-3971  
Email: [Campbell@workerlaw.com](mailto:Campbell@workerlaw.com)

DREW E. LUNT, ATTORNEY  
MCKENNA LONG & ALDRIDGE LLP  
303 Peachtree St NE, Suite 5300  
Atlanta, GA 30308-3265  
Email: [dlunt@mckennalong.com](mailto:dlunt@mckennalong.com)

RICHARD B. HANKINS, ATTORNEY  
MCKENNA LONG & ALDRIDGE LLP  
303 Peachtree St NE, Suite 5300  
Atlanta, GA 30308-3265  
Email: [rhankins@mckennalong.com](mailto:rhankins@mckennalong.com)

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**THE BOEING COMPANY**

**and**

**Case 19-CA-32431**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS**

**ACTING GENERAL COUNSEL'S OPPOSITION  
TO RESPONDENT'S MOTION TO DISMISS AND MOTION TO STRIKE**

Mara-Louise Anzalone  
Peter G. Finch  
Rachel Harvey  
Counsel for the Acting General Counsel  
National Labor Relations Board - Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174  
Telephone: 206.220.6301  
Facsimile: 206.220.6305  
Email: mara-louise.anzalone@nlr.gov  
peter.finch@nlr.gov  
rachel.harvey@nlr.gov



## TABLE OF CONTENTS

|                                                                                                                                                              | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF CONTENTS .....                                                                                                                                      | I           |
| TABLE OF AUTHORITIES .....                                                                                                                                   | ii, iii     |
| I. PROCEDURAL BACKGROUND .....                                                                                                                               | 3           |
| II. RESPONDENT'S MOTION TO DISMISS SHOULD BE DENIED .....                                                                                                    | 3           |
| A. The Legal Standards .....                                                                                                                                 | 4           |
| B. Disposition of this Case at This Early Stage is Inappropriate.....                                                                                        | 6           |
| 1. The Complaint's Independent § 8(a)(1)<br><u>Allegations Clearly State a Claim</u> .....                                                                   | 6           |
| 2. The Complaint Properly States that Respondent<br>Has Discriminated Against Its Employees<br><u>Based on Their Union and Other Protected Conduct</u> ..... | 8           |
| 3. <u>The Complaint Is Consistent with Supreme Court Precedent</u> .....                                                                                     | 10          |
| 4. The Alleged Contractual Waiver Does Not<br><u>Privilege Conduct that Violates § 8(a)(3)</u> .....                                                         | 12          |
| III. RESPONDENT'S MOTION TO STRIKE SHOULD BE DENIED.....                                                                                                     | 13          |
| IV. CONCLUSION .....                                                                                                                                         | 16          |

## TABLE OF AUTHORITIES

| <u>CASES</u>                                                                                                                                                 | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <i>Adair Standish Corp.</i> , 290 NLRB 317 (1988), <i>enfd.</i><br><i>in pertinent part</i> , 912 F.2d 854 (6th Cir. 1990).....                              | 9, 10       |
| <i>Adco Electric</i> , 307 NLRB 1113 (1992).....                                                                                                             | 12          |
| <i>American Newspaper Publishers Ass'n. v. NLRB</i> , 193 F.2d 782<br>(3d Cir. 1951, <i>aff'd</i> , 345 U.S. 100 (1953)).....                                | 4           |
| <i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965).....                                                                                         | 11          |
| <i>Children's Receiving Home of Sacramento</i> , 248 NLRB 308 (1980).....                                                                                    | 4           |
| <i>Detroit Newspapers</i> , 330 NLRB 524 (2000).....                                                                                                         | 4, 6, 7     |
| <i>Dorsey Trailers, Inc.</i> , 327 NLRB 835 (1999), <i>enfd.</i><br><i>in pertinent part</i> , 233 F.3d 831 (4th Cir. 2000).....                             | 7           |
| <i>Excel Case Ready</i> , 334 NLRB 4 (2001).....                                                                                                             | 14          |
| <i>First National Maintenance Corp.</i> , 452 U.S. 666 (1981).....                                                                                           | 12          |
| <i>Fox-Art Theatres</i> , 290 NLRB 885 (1988).....                                                                                                           | 6           |
| <i>General Electric Co.</i> , 215 NLRB 520 (1974).....                                                                                                       | 7           |
| <i>George A. Hormel &amp; Co.</i> , 301 NLRB 47 (1991).....                                                                                                  | 15          |
| <i>Kaumagraph Corp.</i> , 313 NLRB 624 (1994).....                                                                                                           | 14          |
| <i>KIRO, Inc.</i> , 311 NLRB 745 (1993).....                                                                                                                 | 5, 6        |
| <i>Krieger-Ragsdale &amp; Co., Inc.</i> , 159 NLRB 490 (1966), <i>enfd.</i> , 379<br>F.2d 517 (7th Cir. 1967), <i>cert. denied</i> 389 U.S. 1041 (1968)..... | 5           |
| <i>Kroger Co.</i> , 311 NLRB 1187 (1993), <i>affd. Mem.</i> , 50 F.3d<br>1037 (11th Cir. 1995).....                                                          | 7           |
| <i>Lear Siegler, Inc.</i> , 295 NLRB 857 (1989).....                                                                                                         | 14, 15      |
| <i>MacKay Radio &amp; Telegraph Co.</i> , 304 U.S. 333 (1938).....                                                                                           | 14          |

|                                                                                                                                                     |       |
|-----------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| <i>Morse v. Regents of University of Colorado</i> , 154 F.3d 1124 (10th Cir. 1998).....                                                             | 5     |
| <i>NLRB v. Adco Electric</i> , 6 F.3d 1110 (5th Cir. 1993).....                                                                                     | 12    |
| <i>NLRB v. Brown Food Store</i> , 380 U.S. 279 (1965).....                                                                                          | 11    |
| <i>NLRB v. Erie Resistor Corp.</i> , 373 U.S. 221 (1963).....                                                                                       | 12    |
| <i>NLRB v. Glssel Packing Co.</i> , 395 U.S. 575 (1969).....                                                                                        | 7, 8  |
| <i>NLRB v. Piqua Munising Wood Prods. Co.</i> , 109 F.2d 552 (6th Cir. 1940).....                                                                   | 4, 9  |
| <i>National Fabrlicators</i> , 295 NLRB 1095 (1989), <i>enfd</i> , 903 F.2d 396<br>(5th Cir. 1990), <i>cert. denied</i> , 498 U.S. 1024 (1991)..... | 11    |
| <i>Peerless Pump Co.</i> , 345 NLRB 371 (2005).....                                                                                                 | 12    |
| <i>Pittsburg &amp; Midway Coal Mining Co.</i> , 355 NLRB No. 197 (2010).....                                                                        | 9, 10 |
| <i>Quanta</i> , 355 NLRB No. 217 (2010).....                                                                                                        | 3     |
| <i>Redd-I, Inc.</i> , 290 NLRB 1115 (1988).....                                                                                                     | 14    |
| <i>Reno Hilton Resorts v. NLRB</i> , 196 F. 3d 1275 (D.C. Cir. 1999).....                                                                           | 13    |
| <i>RGC (USA) Mineral Sands, Inc. v. NLRB</i> , 281 F. 3d 442 (4th Cir. 2002).....                                                                   | 13    |
| <i>Robbins v. Wilkie</i> , 300 F.3d 1208 (10th Cir. 2002).....                                                                                      | 4     |
| <i>Sunland Construction Co.</i> , 311 NLRB 685 (1993).....                                                                                          | 14    |
| <i>Sutter Lakeside Hosp.</i> , JD(SF)-20-94 (1994).....                                                                                             | 14    |
| <i>Tawas Industries</i> , 336 NLRB 318 (2001).....                                                                                                  | 7     |
| <i>Textile Workers v. Darlington Co.</i> , 380 U.S. 263 (1965).....                                                                                 | 12    |
| <i>The Artesia Cos., Inc.</i> , 339 NLRB 1224 (2003).....                                                                                           | 4     |
| <i>United States Postal Service</i> , 311 NLRB 254 (1993).....                                                                                      | 5, 6  |
| <i>Weiner v. Klais &amp; Co., Inc.</i> , 108 F.3d 86 (6th Cir. 1997).....                                                                           | 5     |

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**THE BOEING COMPANY**

**and**

**Case 19-CA-32431**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS**

**ACTING GENERAL COUNSEL'S OPPOSITION  
TO RESPONDENT'S MOTION TO DISMISS AND MOTION TO STRIKE**

Pursuant to § 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel opposes the "Motion to Dismiss for Failure to State a Claim, or, in the Alternative, to Strike the Injunctive Relief Sought in ¶ 13(A) of the Complaint" (the "Motion") filed by Respondent The Boeing Company ("Respondent") on June 14, 2011. Respondent's Motion is premised on factual allegations based on a significant number of unsupported hearsay statements and exhibits, which cannot support a motion to dismiss.<sup>1</sup> To the contrary, as demonstrated below, the Complaint in this case readily meets notice pleading requirements to state a claim under well-established precedent under the National Labor Relations Act ("NLRA" or the "Act").

Respondent's alternative request that the Administrative Law Judge preemptively declare that the remedy sought is unavailable to the alleged discriminatees in this case is woefully premature, as the remedy requested is the standard remedy for the

---

<sup>1</sup> In this regard, it is noted that the Administrative Law Judge explicitly informed the parties that he did not wish for them to submit factual, as opposed to legal, analysis in their pre-trial briefs.

violations alleged and no record evidence has yet been adduced to support a claim that such a remedy is inappropriate on the facts of this case.

## **I. PROCEDURAL BACKGROUND**

Paragraphs 6 and 9 of the Complaint allege that Respondent violated § 8(a)(1) of the Act by making coercive statements that it would remove or had removed work from bargaining units represented by International Associations of Machinists and Aerospace Workers, District Lodge 751, affiliated with International Associations of Machinists and Aerospace Workers (the "Union") because employees had struck, and by threatening or impliedly threatening that the bargaining units would lose additional work in the event of future strikes. Paragraphs 7, 8, and 10 of the Complaint allege that Respondent violated §§ 8(a)(3) and (1) of the Act by deciding to transfer a second 787 Dreamliner production line and a sourcing supply program for its 787 Dreamliner production from the bargaining units represented by the Union to its non-union site in North Charleston, South Carolina, or to subcontractors. Paragraph 13(a) of the Complaint seeks restoration of the *status quo ante* and requests as part of the remedy that Respondent be ordered to have bargaining-unit employees operate its second 787 Dreamliner production line in the State of Washington, utilizing supply chains maintained by the bargaining units in the Seattle, Washington, and Portland, Oregon, area facilities; and paragraph 13(b) of the Complaint states that other than as set forth in paragraph 13(a), the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

In its Answer, Respondent essentially denies all allegations of paragraphs 6 through 10 of the Complaint and denies that the relief sought in paragraph 13(a) of the Complaint will not effectively cause it to shut down its assembly facility in North Charleston, South Carolina. In addition to denying these and other paragraphs of the Complaint, Respondent raises 14 affirmative defenses. Among other things, Respondent contends in its third affirmative defense that:

[Respondent's] decision to place the second 787 assembly line in North Charleston was based upon a number of varied factors, including a favorable business environment in South Carolina for manufacturing companies like [Respondent]; significant financial incentives from the State of South Carolina; achieving geographic diversity of its commercial airline operations; as well as to protect the stability of the 787's global production system. [...] [Respondent] would have made the same decisions with respect to the placement of the second assembly line in North Charleston even if it had not taken into consideration the damaging impact of future strikes on the production of 787s.

Respondent further contends in its eighth affirmative defense that the remedy requested in the Complaint "would cause an undue hardship on [Respondent], its employees, and the state of South Carolina," and that "none of the complained of actions caused any hardship on any [of Respondent's] employees or the State of Washington." Thus, the pleadings leave numerous material issues in dispute.

## **II. RESPONDENT'S MOTION TO DISMISS SHOULD BE DENIED**

### **A. The Legal Standard**

The Board has adopted a system of notice pleading for its complaints. *Quanta*, 355 NLRB No. 217, slip op. at 2 (2010). This system is governed by § 102.15 of the Board's Rules and Regulations, which requires only that Complaints contain "(a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is



predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." As was aptly explained long ago:

The sole function of the Complaint is to advise the respondent of the charges constituting unfair labor practices as defined in the Act that he may have due notice and a full opportunity for hearing thereon. The Act does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. All that is requisite in a valid Complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense.

*NLRB v. Piqua Munising Wood Prods. Co.*, 109 F.2d 552, 557 (6th Cir. 1940). See also *American Newspaper Publishers Ass'n. v. NLRB*, 193 F.2d 782, 800 (3d Cir. 1951), *aff'd*, 345 U.S. 100 (1953); *The Artesia Cos., Inc.*, 339 NLRB 1224, 1226 (2003).

A Complaint cannot be dismissed for failure to state a claim upon which relief may be granted when the allegations of the Complaint, if true, set forth a violation of the Act. *Children's Receiving Home of Sacramento*, 248 NLRB 308, 308 (1980). In considering a motion to dismiss, "the Board construes the Complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers*, 330 NLRB 524, 524, n.1 (2000). There is a "powerful presumption against rejecting pleadings for failure to state a claim." *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002) (reversing district court's decision to dismiss RICO complaint for failure to state a claim). Granting a motion to dismiss is "a harsh remedy which must be cautiously studied, not only to

effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morse v. Regents of University of Colorado*, 154 F.3d 1124, 1127 (10th Cir. 1998). Thus, in ruling on a motion to dismiss for failure to state a claim, it is not appropriate to look outside the pleadings themselves and consider additional facts alleged by the moving party. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88-89 (6th Cir. 1997).

To the extent Respondent has attached inadmissible facts and documents to its Motion, the Administrative Law Judge may appropriately consider the Motion under the Board's summary judgment standard. The Board has rejected any summary judgment procedure akin to the procedure set forth in Rule 56(e) of the Federal Rules of Civil Procedure, under which a moving party can set forth its version of the facts and the opposing party must admit or controvert those facts.<sup>2</sup> Because the Board's rules do not provide for pre-trial discovery (*KIRO, Inc.*, 311 NLRB 745, 746, n.4 (1993); *United States Postal Service*, 311 NLRB 254, 254 n.3 (1993), *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, 495 (1966), *enfd.*, 379 F.2d 517 (7th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968)), the Board has held that summary judgment proceedings are governed by the Board's Rules and Regulations, and not by the Federal Rules of Civil Procedure. *KIRO, Inc.*, 311 NLRB at 746. Under the Board's Rules and Regulations, a motion for summary judgment or dismissal must be denied where the pleadings indicate that there is a genuine issue of material fact. Board's Rules and Regulations § 102.24.

---

<sup>2</sup> Section 10(b) of the Act states that Board proceedings shall be conducted in accordance with the Federal Rules of Civil Procedure "so far as practicable." Respondent's statement that "this tribunal is obligated to conduct this hearing" under the Federal Rules of Civil Procedure is an overstatement. (Motion to Dismiss at 10) To the extent that the pleading standards set forth in § 102.15 of the Board's Rules and Regulations differ from those set forth in Rule 8 of the Federal Rules of Civil Procedure, the Board's Rules and Regulations govern these proceedings.

Thus, it is well-settled that the General Counsel is not required to set forth precise facts through affidavits or other documentary evidence to show that a genuine issue for hearing exists. *KIRO, Inc.*, 311 NLRB at 746; *United States Postal Service*, 311 NLRB at 254 n.3. Instead, the General Counsel may rely upon the allegations in the Complaint, Respondent's denial of these allegations in its Answer, and general averments that factual issues exist requiring a hearing. *KIRO, Inc.*, 311 NLRB at 745-746, 745 n.3; *United States Postal Service*, 311 NLRB at 254, n.2. Cf. *Fox-Art Theatres*, 290 NLRB 885, 885 (1988) (where Respondent admits allegations and fails to state specifically the basis for disagreement with the backpay specification, summary judgment is appropriate). Based on these principles, and as discussed *infra*, summary judgment is wholly inappropriate in this case.

**B. Disposition of this Case at This Early Stage is Inappropriate**

In accordance with the requirements of § 102.15 of the Board's Rules and Regulations, the Complaint allegations are sufficient to put Respondent on notice of the specific "acts which are claimed to constitute unfair labor practices." Further, accepting all factual allegations to be true, these allegations are sufficient to support a claim for relief. See *Detroit Newspapers*, 330 NLRB at 524, n.7.

**1. The Complaint's Independent § 8(a)(1)  
Allegations Clearly State a Claim**

Paragraphs 6 and 9 of the Complaint allege that Respondent violated § 8(a)(1) of the Act by "ma[king] coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck" and by "threatening or impliedly threatening that the Unit would lose additional work in the event of future strikes." Paragraph 6 of the Complaint enumerates five statements made on specific

dates and at specific locations, by admitted, named high level managers of Respondent, all of whom linked the decision regarding the location of work to past strikes or potential future strikes by unit employees.

Such statements, if proven, would clearly violate § 8(a)(1). See, e.g., *Detroit Newspapers*, 330 NLRB 524, 524, n.1 (2000). See also *General Electric Co.*, 215 NLRB 520, 520-21 (1974). Indeed, the Board has held that an employer violates § 8(a)(1) by threatening to withhold work opportunities because of employees' exercise of § 7 rights. See, e.g., *Dorsey Trailers, Inc.*, 327 NLRB 835, 851 (1999) (threat to close plant if employees went on strike), *enfd. in pertinent part*, 233 F.3d 831 (4th Cir. 2000); *Kroger Co.*, 311 NLRB 1187, 1200 (1993) (threat to put plan to build a new freezer facility on hold), *affd. mem.*, 50 F.3d 1037 (11th Cir. 1995). Further, employer "predictions" of loss of customers due to unionization or strike disruptions without any factual basis amount to unlawful threats. See, e.g., *Tawas Indus.*, 336 NLRB 318, 321 (2001) (no objective basis for prediction of loss of customers due to fear of strikes in the event that the employees' independent union affiliated with a particular international union).

The Respondent's claims based on *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), are evidentiary claims that cannot be considered in a motion to dismiss. In *Gissel*, the Supreme Court defined the boundary between employer speech protected under § 8(c) of the Act and threats of reprisals violating § 8(a)(1) of the Act. The Court ruled that employer "predictions" of the consequences of unionization are privileged under § 8(c) only if they are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control[.]"

*Id.* As the Court further explained, "threats of economic reprisal to be taken solely on [the employer's] own volition" violate § 8(a)(1). *Id.* at 619 (citation omitted).

Respondent denies substantially all of the allegations of paragraphs 6 and 9 of the Complaint, specifically disputing whether those statements were "carefully phrased based on objective fact," and whether the statements concerned "demonstrably probable consequences beyond [Respondent's] control" (as opposed to actions taken on Respondent's own volition). *Gissel*, 395 U.S. at 618-19. Its assertions, however, are based on factual assertions and out-of-court statements outside the parameters of the Complaint. Hence, they provide no support for Respondent's Motion to Dismiss. As the record evidence will show, Respondent's statements, as alleged, were not based on consequences "beyond its control," but rather constituted threats of reprisal "to be taken solely on [Respondent's] own volition."

As the foregoing demonstrates, there is ample authority for concluding that Respondent's alleged unlawful statements linking decisions about the location of work to past strikes or potential future strikes by its Puget Sound unit employees interfered with employees' rights in violation of § 7 of the Act. Counsel for the Acting General Counsel therefore respectfully requests that Respondent's motion to dismiss the allegations concerning its violation of § 8(a)(1) of the Act for failure to state a claim be denied.

**2. The Complaint Properly States that Respondent  
Has Discriminated Against Its Employees  
Based on Their Union and Other Protected Conduct**

Respondent does not deny that it decided in October 2009 to operate a second final assembly line for its 787 Dreamliner using employees not represented by the

Union. Nor does Respondent deny announcing this decision to its entire workforce, or that it linked that decision to the prior exercise by certain of its employees of their right to strike. Instead, Respondent argues that the Complaint fails to adequately state a claim only because it fails to allege specific harm that its action will have on its workforce. (Motion to Dismiss at 3, 18-19).

As a preliminary matter, the Board's notice pleading requirements simply do not require a delineation of the specific effects of Respondent's conduct. See *Piqua Munising Wood Prods. Co.*, 109 F.2d at 557. Further, even if the full effects of Respondent's decision are not wholly felt at this time because the decision has not yet been completely implemented, Board law makes clear that a discriminatory decision about where to place work may alone constitute discrimination with respect to unit employees' terms and conditions of employment in violation of § 8(a)(3), even where there has been no actual financial loss, and even where there has been no *immediate* impact on the discriminatees. *Pittsburg & Midway Coal Mining Co.*, 355 NLRB No. 197 (2010); *Adair Standish Corp.*, 290 NLRB 317, 318-19 (1988), *enfd. in pertinent part*, 912 F.2d 854 (6th Cir. 1990).

For example, the Board has found that an employer's diversion of work from a newly organized plant to a non-union plant for unlawfully motivated reasons violated § 8(a)(3) of the Act even though there was no immediate impact on unit employees. *Adair Standish Corp.*, 290 NLRB at 318-19 (1988). In *Adair Standish*, the employer refused to take delivery of a new press at a newly organized plant and instead installed the press at a nonunion plant for unlawful reasons. *Id.* The Board found a § 8(a)(3)



violation, reasoning that "diversion of the new press from [the newly organized plant] could reasonably result in diversion of new work from [that plant]." *Id.* at 319.

The claim clearly alleged in the Complaint is that, but for the Respondent's discriminatory motive, the second final assembly line and supply lines work would have been assigned to the Unit employees. At trial, the Acting General Counsel will demonstrate that, as in *Adair Standish*, by placing that work in South Carolina, work that Unit employees otherwise would have performed, is being diverted to non-Unit employees in retaliation for their exercise of § 7 rights and to discourage them from exercising these rights in the future. Thus, Respondent's decision deprives bargaining Unit employees of opportunities to work on what Respondent touts as its "latest generation of commercial aircraft, using lightweight composite materials to create one of the most fuel-efficient, technologically advanced passenger planes in the world." (Motion to Dismiss at 4). Even assuming for the sake of argument that there has not yet been a financial impact on any Unit employee or prospective Unit employee, the fact that the employees have not yet experienced a financial impact is no defense for a violation of § 8(a)(3). See *Pittsburg & Midway Coal Mining Co.*, 355 NLRB No. 197, slip op. at 5, n.8.

### **3. The Complaint is Consistent with Supreme Court Precedent**

As noted above, the Complaint alleges that Respondent's discriminatory actions were undertaken because of its employees' exercise of their § 7 rights and also that those actions were inherently destructive to their § 7 rights. Respondent essentially argues that, as a matter of law, its consideration of the potential for future strikes in deciding where to place the second final assembly line and supply lines was privileged

under the United States Supreme Court's decisions in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (permitting preemptive lockout), and *NLRB v. Brown Food Store*, 380 U.S. 279 (1965) (permitting preemptive lockout and use of temporary replacements in the face of a whipsaw strike). Respondent cites those cases for the proposition that employers may legitimately blunt the effectiveness of anticipated strikes. (Motion to Dismiss at 22). However, the holdings of *American Ship Building* and *Brown* – both of which involved employers' actions taken in response to the actual likelihood of an imminent strike – cannot be extended to legitimize any actions by employers to secure themselves against wholly speculative future strikes.

Indeed, the Board has rejected attempts by employers to argue for such extensions. For example, in *National Fabricators*, 295 NLRB 1095, 1095 (1989), *enfd*, 903 F.2d 396 (5th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991), the Board rejected an employer's attempt to use *Brown* and other lockout cases to justify the layoff of employees it believed were likely to honor a picket line in the future. *Id.* The Board reasoned that disfavoring employees who would engage in union activities violated § 8(a)(3). *Id.* Thus, *American Ship Building* and *Brown* are inapposite here, as Respondent's actions were taken in retaliation for past strikes and to secure itself against wholly speculative future strikes.

Further, Respondent is simply wrong when it argues no § 8(a)(3) violation can be found because the Complaint does not allege facts that would establish that it harbored animus toward employees' protected activities. The allegations of paragraphs 6 and 9 of the Complaint, if accepted as true, would be sufficient to establish animus toward employees' union activities as well as independent violations of § 8(a)(1). Moreover,

Respondent's "Inherently destructive" conduct, once proven, will itself establish discriminatory intent. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

**4. The Alleged Contractual Waiver Does Not Privilege Conduct that Violates § 8(a)(3)**

Respondent argues that the Complaint must be dismissed because a clause in the parties' collective bargaining agreement concerning Respondent's right to decide where to perform work precludes a finding that its placement of the second final assembly line and supply lines in South Carolina violated § 8(a)(3) as a matter of law. Such a claim amounts to an improper attempt to seek dismissal of the Complaint for failure to state a claim based on facts beyond those contained in the Complaint. Further, to the extent Respondent claims that this language privileges it to base work location decisions on discriminatory motives, the Acting General Counsel vigorously disputes that claim.

Respondent's assertion that the contractual waiver permits it to decide the location of work without bargaining with the Union does not defeat the Complaint. It is settled law that "[an employer's] bargaining obligations to the Union are distinct<sup>3</sup> from its legal duty not to discriminate against strikers...the legal theories are fundamentally different." *Peerless Pump Co.*, 345 NLRB 371, 374 (2005). In fact, the Supreme Court has distinguished conduct that, while removed from § 8(a)(5)'s protection, nonetheless will violate § 8(a)(3) if "motivated by antiunion animus." *First National Maintenance Corp.*, 452 U.S. 666, 682 (1981) (citing *Textile Workers v. Darlington Co.*, 380 U.S. 263

---

<sup>3</sup> It is for this reason that cases that rely on an analysis of § 8(a)(5) obligations are irrelevant to complaints containing only §§ 8(a)(1) and 8(a)(3) charges. See *NLRB v. Adco Electric*, 6 F.3d 1110, 1116 (5th Cir. 1993), enforcing *Adco Electric*, 307 NLRB 1113, 1116 (1992) (duty to bargain irrelevant where case alleges discrimination because of protected concerted activities; there is no refusal to bargain allegation).

(1965)). It is also well established that an "employer cannot exercise contractual rights to punish employees for protected activity." *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 450 (4th Cir. 2002); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999).

Thus, a contractual privilege to decide where to place the second final assembly line and the supply lines without bargaining would not privilege Respondent to place the work in South Carolina for the discriminatory reasons alleged in the Complaint. Counsel for the Acting General Counsel respectfully requests that the Administrative Law Judge deny Respondent's Motion to Dismiss the allegations that Respondent violated § 8(a)(3) of the Act for failure to state a claim for which relief can be granted.

### **III. RESPONDENT'S MOTION TO STRIKE SHOULD BE DENIED**

Respondent has requested that the Administrative Law Judge "strike" paragraph 13(a) of the Complaint, which seeks an order requiring Respondent to have the bargaining-unit employees operate the second final assembly line in the State of Washington, utilizing supply lines maintained by bargaining-unit employees in Seattle, Washington, and Portland, Oregon. Respondent has not (and cannot) provide any cogent rationale for expecting the Administrative Law Judge to preemptively declare that the remedy sought is inappropriate. Striking a portion of the remedy sought by the Acting General Counsel before any evidence has been taken and before any decision on the merits of the case is manifestly inappropriate. Indeed, Respondent's insistence that the remedy sought is "profoundly unjust" is frankly puzzling; surely, in order to determine how just or otherwise appropriate the requested remedy may be requires an adjudication of the underlying dispute.

Regardless of Respondent's arguments to the contrary, § 10(c) of the Act authorizes the Board to order "such affirmative action ... as will effectuate the policies of [the] Act." The Supreme Court has explained that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938). In other words, the Board has broad discretion to craft an appropriate remedy based on the facts of each case. *Excel Case Ready*, 334 NLRB 4, 5 (2001). Once a complaint has issued, the authority to craft a remedy rests with the Board, and the Board's Administrative Law Judges have only limited authority to restrict the presentation of evidence in support of particular remedies, including remedies sought by parties other than the General Counsel.<sup>4</sup> *Kaumagraph Corp.*, 313 NLRB 624, 624-25 (1994); *Sunland Construction Co.*, 311 NLRB 685, 706 (1993). Accordingly, "the issue of whether the sought remedy or any other remedy is appropriate 'is best determined following a hearing.'" *Sutter Lakeside Hosp.*, JD(SF)-20-94 at 1 (1994) (describing the basis for an Administrative Law Judge's decision to deny a motion to strike the remedy sought in a complaint).

Moreover, in cases involving discriminatory transfers of operations, the Board's usual practice is to require as a remedy the restoration of the *status quo ante*. In fact, the remedy sought by the Acting General Counsel here is the *standard* remedy for a case such as this. See *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). Thus, in the instant case, if the second assembly line would have been located in the State of Washington, with its supply lines in Seattle, Washington, and Portland, Oregon, but for

---

<sup>4</sup> To the extent the Board has delegated to the Administrative Law Judge the right to recommend remedies, that authority is limited to expanding the remedy to comport with recommended findings of violations, and does not authorize preempting the Board's consideration of an issue. See, e.g., *Redd-I, Inc.*, 290 NLRB 1115, 1118-19 (1988).

Respondent's alleged discriminatory conduct, restoration of the second final assembly line and the supply lines in those locations is presumptively an appropriate remedy.

Respondent may undertake at trial to demonstrate that such a requested remedy should be denied because it would be unduly burdensome. See *Lear Siegler*, 295 NLRB at 861. Respondent, however, bears the evidentiary burden of proving burdensomeness. See, e.g., *George A. Harmel & Co.*, 301 NLRB 47, 47 (1991). It obviously cannot carry that burden on a motion to dismiss before the adducement of any evidence, and its unsupported assertions of burdensomeness certainly do not warrant striking the requested remedy.<sup>5</sup> Rather, such claims must be litigated in an evidentiary hearing, so that the Board can decide the appropriate remedy given the facts of the case, as required under § 10(c) of the Act. *Lear Siegler*, 295 NLRB at 861. Moreover, Respondent bears the burden of proving its affirmative defense that the remedy sought is inappropriate.

Respondent has cited no precedent (nor has Counsel for the Acting General Counsel located any) in which an Administrative Law Judge (or the Board) has restricted the remedy sought before a decision has been made with respect to the merits of the underlying unfair labor practice charge. This is unsurprising, considering the common-sense advisability of adducing facts and making a decision on the merits of a charge before any remedies are foreclosed. Counsel for the Acting General Counsel

---

<sup>5</sup> To the extent Respondent disagrees that it would have placed the line in Washington, even absent its consideration of its employees' union and other protected conduct, that is a claim going to the merits of the Complaint, to which it may adduce any relevant supporting evidence at trial. The Respondent cannot, at this stage, however, legitimately argue that the Administrative Law Judge determine the scope and form of the correct remedy, when that judgment requires weighing the evidence that the Respondent has not provided.



therefore respectfully requests that Administrative Law Judge Anderson deny Respondent's ill-conceived motion to strike paragraph 13(a) of the Complaint.

#### **IV. CONCLUSION**

For the reasons set forth above, the Complaint fully complies with the Board's notice pleading requirements, and its allegations, when borne out by the evidence, are sufficient to establish a violation of the Act. Dismissal of the Complaint for failure to state a claim is therefore inappropriate. Further, striking the portion of the remedial relief requested by the Acting General Counsel at this stage of the proceedings, when no evidence has yet been adduced, as requested by Respondent, would also be inappropriate in view of the Board's duty to craft a remedy based on the facts of the case. Counsel for the Acting General Counsel therefore respectfully requests that the Administrative Law Judge deny Respondent's motion to dismiss for failure to state a claim and its motion to strike a portion of the remedial relief sought by the Acting

General Counsel. Counsel for the Acting General Counsel further request that an evidentiary hearing regarding all matters raised in the Complaint in this matter proceed.

**DATED** at Seattle, Washington, this 21<sup>st</sup> day of June, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mara-Louise Anzalone', written over a horizontal line.

Mara-Louise Anzalone

Peter G. Finch

Rachel Harvey

Counsel for the Acting General Counsel

National Labor Relations Board - Region 19

2948 Jackson Federal Building

915 Second Avenue

Seattle, Washington 98174

Telephone: 206.220.6301

Facsimile: 206.220.6305

Email: [maralouise.anzalone@nlr.gov](mailto:maralouise.anzalone@nlr.gov)

[peter.finch@nlr.gov](mailto:peter.finch@nlr.gov)

[rachel.harvey@nlr.gov](mailto:rachel.harvey@nlr.gov)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Opposition to Respondent's Motion to Dismiss and Motion to Strike was served on the 21<sup>st</sup> day of June, 2011, on the following parties:

### E-File:

The Honorable Clifford H. Anderson  
Administrative Law Judge  
National Labor Relations Board, Division of Judges  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### E-mail:

Richard B. Hankins, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[rhankins@mckennalong.com](mailto:rhankins@mckennalong.com)

Drew E. Lunt, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[dlunt@mckennalong.com](mailto:dlunt@mckennalong.com)

William J. Kilberg, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[wkilberg@gibsondunn.com](mailto:wkilberg@gibsondunn.com)

Alston D. Correll, Attorney  
McKENNA LONG & ALDRIDGE LLP  
303 Peachtree St. N.E., Suite 5300  
Atlanta, GA 30308-3265  
[acorrell@mckennalong.com](mailto:acorrell@mckennalong.com)

Eugene Scalia, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[escalia@gibsondunn.com](mailto:escalia@gibsondunn.com)

Matthew D. McGill, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[mmcgill@gibsondunn.com](mailto:mmcgill@gibsondunn.com)

Paul Blankenstein, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[pblankenstein@gibsondunn.com](mailto:pblankenstein@gibsondunn.com)

Daniel J. Davis, Attorney  
GIBSON DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5306  
[ddavis@gibsondunn.com](mailto:ddavis@gibsondunn.com)

David Campbell, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Campbell@workerlaw.com](mailto:Campbell@workerlaw.com)

Carson Glickman-Flora, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Flora@workerlaw.com](mailto:Flora@workerlaw.com)

Robert H. Lavitt, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Lavitt@workerlaw.com](mailto:Lavitt@workerlaw.com)

Jennifer Robbins, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[Robbins@workerlaw.com](mailto:Robbins@workerlaw.com)

**U.S. Mail:**

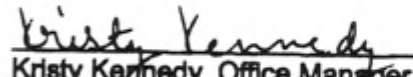
Douglas P. Kight, Attorney  
The Boeing Company  
P.O. Box 3707, MS 13-08  
Seattle, WA 98124-2207

Machinists District Lodge 751  
9135 15<sup>th</sup> Pl. S.  
Seattle, WA 98108-5100

Sean Leonard, Attorney  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[leonard@workerlaw.com](mailto:leonard@workerlaw.com)

Jude Bryan, Paralegal  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT LLP  
18 W. Mercer St., Suite 400  
Seattle, WA 98119-3971  
[bryan@workerlaw.com](mailto:bryan@workerlaw.com)

Christopher Corson, General Counsel  
IAM  
9000 Machinists Pl.  
Upper Marlboro, MD 20772-2687  
[ccorson@iamaw.org](mailto:ccorson@iamaw.org)

  
Kristy Kennedy, Office Manager

**Congress of the United States**  
**House of Representatives**

June 6, 2011

Mr. Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D. C. 20570

Dear Mr. Solomon:

As Chairman of the Labor, Health and Human Services, Education and Related Agencies Appropriations Subcommittee, I take my oversight responsibilities very seriously. And while that most often involves matters of a fiscal nature, it is also my role to vigorously address any impropriety and to prevent any abuse of authority or policy overreach from occurring within any agency under the jurisdiction of this subcommittee.

I am writing regarding the National Labor Relations Board's ("NLRB") actions in response to a decision by The Boeing Company ("Boeing") to locate its new 787 Dreamliner manufacturing facility in Charleston, South Carolina. In making this decision, Boeing sought to achieve economic competitiveness for its global customer base, create jobs and an economic boom to a state that has nearly 10% unemployment, and maintain its status as a world leader in the aerospace industry. Boeing has a strong record of providing good-paying jobs for American workers, including in my home-state of Montana, and for helping keep America safe. This is exactly the type of private enterprise expansion our economy needs to drive itself through a still-sluggish recovery.

I believe the NLRB's decision to issue a complaint against Boeing in this matter represents a complete breach of the Federal government's role in regulating private industry and that the remedy cited therein is extraordinary and unprecedented. The remedy provided for in this complaint would require Boeing to move the second manufacturing line to the state of Washington. It is more than troubling to me that any agent of the Federal government would have the audacity to seek to overturn legitimate, core business decisions of a private enterprise. Should you succeed in this complaint, not only would Boeing have to abandon the over \$1 billion it has currently spent on this facility over the last 17 months, it would also surely need to spend considerably more to build new capacity in Washington. The lost investment and delay in time would significantly impair the company's ability to meet customer demands and commitments for existing orders.

2448 Rayburn House Office Building  
Washington, DC 20515  
(202) 225-3211

1201 Grand Avenue, Suite 1  
Billings, MT 59102  
(406) 256-1019  
Toll Free: 1-888-232-2626

950 North Montana Avenue  
Helena, MT 59601  
(406) 443-7878

301 East Broadway  
Suite 2  
Missoula, MT 59802  
(406) 543-9550

105 Smelter Avenue, NE  
Suite 16  
Great Falls, MT 59404  
(406) 454-1086

Your complaint, Mr. Solomon, strikes at the heart of Boeing's respected business model, and is reportedly already having a chilling effect on entity's who are considering constructing new facilities in the United States. At a time when this economy needs all the investment it can get, this draconian remedy sends exactly the wrong message to all businesses, large and small, and creates an overwhelming disincentive to new economic investment.

In a recent statement you said that "there is nothing remarkable or unprecedented about the complaint issued against the Boeing Company on April 20... [t]he complaint involves matters of fact and law that are not unique to this case....". I do find this complaint remarkable, and I am seriously concerned with the use of agency resources to pursue such an extraordinary and unusual remedy given the detrimental economic impact it is certain to cause. At the very least, the NLRB needs to articulate a clear basis for this complaint.

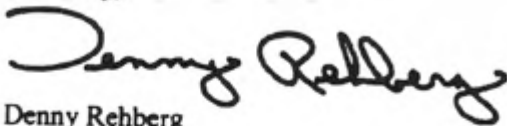
Therefore, I am requesting examples of other complaints where the Office of General Counsel has made similar allegations that were:

1. Based upon an entity's decision regarding where to locate new work or a new production/manufacturing line, rather than the transfer of existing work (which is the case with Boeing), and
2. Made in absence of the entity being formally accused or cited for taking adverse actions against union employees.

Please also provide information regarding the resolution of such cases, including final remedies, if any.

Thank you very much for your timely response to my request.

Sincerely,



Denny Rehberg  
Chairman

House Appropriations Committee  
Subcommittee on Labor, Health and Human Services, Education and Related Agencies





United States Government

**NATIONAL LABOR RELATIONS BOARD**

1099 14<sup>th</sup> STREET NW  
WASHINGTON DC 20570

June 10, 2011

The Honorable Darrell Issa  
Chairman, Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

I write in response to your June 7, 2011 letter asking me to reconsider your invitation to testify at the June 17, 2011 hearing in North Charleston, South Carolina. I recognize that Congressional oversight power is broad and that the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."<sup>1</sup> That is accomplished, however, only when Congressional oversight preserves the "integrity of the judicial aspect of the administrative process."<sup>2</sup>

As to the assertion in your June 7 letter that concerns about Congressional oversight that may border on Congressional intervention are not the Agency's claim to make, I respectfully disagree. In the context of congressional oversight of independent agencies, the courts make a sharp distinction between on the one hand, an agency being asked in its quasi-legislative capacity to make general policy statements regarding its official positions on various matters, and on the other hand, questioning an agency acting in its quasi-judicial capacity about its decisions in a pending case. In *Pillsbury* the court, in finding a due process violation, stated that "to subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the 'wrong' decision, as the Senate subcommittee did in th[at] case, sacrifices the appearance of impartiality-- the *sine qua non* of American judicial justice...." 354 F.2d at 964. The court was troubled by the House and Senate committees' questioning of a number of witnesses about the merits of a pending case, and noted with apparent disapproval, the fact that a number of witnesses, including not only the FTC Chairman, but also the then general counsel and other FTC

---

<sup>1</sup> *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952, 964 (5<sup>th</sup> Cir. 1966).

<sup>2</sup> *Id.*

officials, had been questioned about the merits of the underlying decision. Since *Pillsbury* courts have not only noted that Congressional oversight should uphold the integrity of the legal processes of administrative agencies, they have also recognized that independent agencies have a constitutional and statutory obligation to resist Congressional influence in order to protect the due process rights of the litigants to their administrative proceedings.<sup>3</sup> As to the question of who is a decisionmaker, courts have analyzed the impact of hearings and other Congressional oversight on the independence of, for example, a Brigadier General,<sup>4</sup> the Secretary of Transportation,<sup>5</sup> and a staff attorney directing an administrative enforcement action,<sup>6</sup> when determining if that oversight intruded into the thought processes of the decisionmaker. Your June 7, 2011 letter incorrectly characterizes *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978) as declining to extend the holding in *Pillsbury* to agency employees or advisors. In fact, the court in that case expressly noted that a close advisor to the Secretary could be viewed as a decisionmaker and assumed that he was for purposes of the *Pillsbury* analysis. The court simply held that in that case there was no due process violation or impairment of the appearance of impartiality because the advisor had not characterized the validity of the claims in the pending case. 580 F.2d at 610.

As Acting General Counsel of the National Labor Relations Board, I am ultimately responsible for overseeing the litigation commencing on June 14, 2011 in Seattle, Washington and for making all strategic decisions related to the prosecution of this case, including the remedial portion of the proceeding. While I agree that conducting Congressional hearings during the pendency of an

---

<sup>3</sup> See, e.g., *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (ruling the court would not enforce an administrative subpoena if the agency did nothing to prevent the abuse of its process by congressional influence); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (administrative decision can only be compromised by congressional intervention if "extraneous factors intruded into the calculus of consideration of the individual decision maker"); *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention); *Gulf Oil Corporation v. FPC*, 563 F.2d 588 (3d Cir. 1977) (court found that Congressional intervention into the administrative process did not influence the agency because the agency did not accede to Congressional requests).

<sup>4</sup> See *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983).

<sup>5</sup> See *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971).

<sup>6</sup> See *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981).

administrative proceeding may not be inherently improper, I am sure you would agree that oversight could have harmful consequences in a particular case. Premature disclosure of evidence and legal arguments is likely to have a negative impact on the rights of the litigating parties, breach assurances of confidentiality and other privileges, and generally unduly interfere with an enforcement action. In fact, all parties to this case have resisted production of subpoenaed documents relying upon certain well-established privileges, including attorney work product, confidentiality and proprietary interests. Those arguments are scheduled to be debated and considered by the administrative law judge during the week of June 14, when the unfair labor practice hearing opens in Seattle.

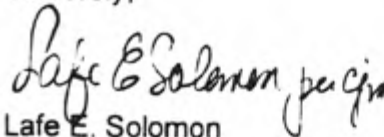
There can be no dispute that both Boeing and the International Association of Machinists and Aerospace Workers must be afforded due process protections and a right to a fair trial during the administrative process, including the remedial portion of the hearing. Fairness to all sides is best assured by allowing the administrative process to take its usual course. The parties will be able to address all issues raised by the complaint, including what is the appropriate remedy for any alleged violation and whether restoration of the status quo ante is appropriate in the circumstances of this case. Boeing has a right to establish that the typical remedy sought in this case, i.e. rescission of the allegedly discriminatory action, is unduly burdensome. *See e.g., Lear Siegler, Inc.*, 295 NLRB 857 at 861-862 (1989). Ultimately, the administrative law judge, the National Labor Relations Board, and the courts will decide whether Boeing's actions were discriminatorily motivated, and, if so, what should be the appropriate remedy for that violation.

Because I recognize the legitimate oversight role of Congress and your interest in this case, I am committed to working with you to satisfy the Committee's informational needs, while protecting the constitutional and statutory rights of the parties to this case. In addition to providing the Committee with all public documents relevant to this case, I previously offered to provide copies of the transcript and exhibits from the hearing, as well as post-hearing briefs filed, as soon as they are available. Further, my office offered alternative options to my attendance at the hearing in South Carolina next week in an effort to meet the Committee's needs for information, while protecting the legitimate interests that I have previously identified. More specifically, I have offered to provide written testimony, and to send Richard Siegel, my Associate General Counsel of the Division of Operations, to the South Carolina hearing to provide testimony regarding the Board's policies and procedures. Because Mr. Siegel is not a decisionmaker in the Boeing case, his appearance does not raise the same level of concern under *Pillsbury* as would mine.

The committee has made it clear that it is their intention to subpoena me if I do not voluntarily appear to testify in the hearing scheduled to be conducted in South Carolina on June 17. I am not aware of any other time in the history of the Office of the General Counsel that a General Counsel has been compelled to testify at a Congressional hearing about the merits of a pending case. I continue to have serious concerns about a personal appearance at this hearing and the potential impact that certain areas of inquiry may have on the due process rights of litigants and on the interest of protecting the legal integrity of the decision making process. I have been advised by my staff that as of yesterday evening your staff has not accepted our proposal to have Mr. Siegel attend the hearing. For all of the reasons set forth in this letter, I urge you to reconsider this alternative because I believe this approach best accommodates the Committee's desire to exercise its legitimate oversight without compromising the integrity and independence of the NLRB's enforcement process. If you insist on having me appear personally, I will do so, but cannot and will not compromise the very legitimate interests that I have articulated in all of my communications to you.

If you have any other questions, please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-3700.

Sincerely,



Lafe E. Solomon  
Acting General Counsel

cc: The Honorable Elijah Cummings  
Ranking Minority Member  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives  
2471 Rayburn House Office Building  
Washington, DC 20515

DARRYL E. SBA CALIFORNIA  
HARMAN

DAN BURTON, INDIANA  
JOHN L. MICA, FLORIDA  
TODD RUSSELL PATTS, PENNSYLVANIA  
MICHAEL R. TURNER, OHIO  
PATRICK M. HENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
CONNIE MACK, FLORIDA  
TIM WALBERG, MICHIGAN  
JAMES LANKFORD, OKLAHOMA  
JUSTIN T. AMASH, MICHIGAN  
ANN MARIE BIERBALE, NEW YORK  
PAUL A. HOSAR, D.C. ARIZONA  
PAUL H. LABRADOR, OHIO  
PATRICK MEEHAN, PENNSYLVANIA  
SCOTT DANIEL ARIS, M.D. TENNESSEE  
JOE WALSH, ILLINOIS  
TREV GOWDY, SOUTH CAROLINA  
DENNIS A. ROSS, FLORIDA  
FRANK C. RUTTA, NEW HAMPSHIRE  
BLAKE FARENTHOLD, TEXAS  
MIKE KELLY, PENNSYLVANIA

LAWRENCE J. READY  
STAFF DIRECTOR

ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

MAURICE 202.225.5074  
TOLSON 202.225.2674  
MURPHY 202.225.5067

http://oversight.house.gov

ELIJAH F. HUMPHREY, MARYLAND  
RANJAN SINGH, MEMBER

RODOLPHUS TOMINS, NEW YORK  
CAROLYN B. MALONEY, NEW YORK  
FRANK R. HOLMES, NEW YORK  
DISTRICT OF COLUMBIA  
DENNIS J. KUCINICH, OHIO  
KIM F. TIERNEY, MASSACHUSETTS  
WM. JACK LAY, MISSOURI  
STEPHEN J. LYNCH, MASSACHUSETTS  
M. J. PER, TENNESSEE  
JERALD TONNELLY, VIRGINIA  
MIKE ODGLEY, ILLINOIS  
TERRY K. DAVIS, ILLINOIS  
BRUCE R. BAILEY, IOWA  
PETER W. CH. VERMONT  
JOHN A. YARMUTH, KENTUCKY  
CHRISTOPHER S. MURPHY, CONNECTICUT  
JACKIE SPIER, CALIFORNIA

June 7, 2011

Mr. Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, D.C. 20570-0001

Dear Mr. Solomon:

Thank you for your June 3, 2011, letter. I appreciate the seriousness you give to the due process rights of litigants in the pending Boeing matter.<sup>1</sup> I too recognize these important rights. However, as acknowledged by the U.S. Supreme Court, Congress' power to investigate is extremely broad,<sup>2</sup> and the rights of litigants can be preserved "without having any adverse effect upon the legitimate exercise of the investigative power of Congress."<sup>3</sup> Indeed, Congressional hearings are not inherently improper by virtue of exploring a pending administrative matter.<sup>4</sup> To the contrary, it is the appropriate role of Congress and the Constitutional duty of this Committee to conduct oversight inquiring about the administration of existing laws.<sup>5</sup>

Notably, in exercising an agency's quasi-judicial functions, its "decision-makers" are generally viewed as adjudicators, not necessarily parties who decide to bring an action.<sup>6</sup> For example, in *Pillsbury Company v. Federal Trade Commission*,<sup>7</sup> the leading case on the issue of Congressional intervention, it was the Chairman of the Federal Trade Commission (FTC) who was called to testify at a Congressional hearing, and he had an

<sup>1</sup> *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.

<sup>2</sup> *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>3</sup> *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5<sup>th</sup> Cir. 1966).

<sup>4</sup> *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389 (D. Conn. 2008) (citing *ATX Inc. v. U.S. Department of Transportation*, 41 F.3d 1552 (D.C. Cir. 1994), affirmed by *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2<sup>nd</sup> Cir. 2009)).

<sup>5</sup> *Watkins*, *supra* note 2.

<sup>6</sup> See, e.g., *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5<sup>th</sup> Cir. 1966); *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).

<sup>7</sup> *Pillsbury*, *supra* note 3.



actual role in deciding the ultimate outcome of the pending matter before the FTC.<sup>8</sup> Further, the D.C. Circuit has declined to extend the holding in *Pillsbury* to agency employees or advisors.<sup>9</sup>

In your role as Acting General Counsel, you do not serve as an adjudicator; the Administrative Law Judge will serve that role. You also are removed from the members of the National Labor Relations Board, who will likely be the ultimate adjudicators in the Boeing matter.<sup>10</sup> In fact, you have expressed to me that there has been no communication between the Office of General Counsel and the National Labor Relations Board referring or relating to the investigation of Boeing.<sup>11</sup> Accordingly, the Board should not have been involved in your decision-making process.

Nevertheless, this hearing does not concern your decision-making process or your legal strategy. This hearing will focus on how your actions against Boeing could impact the thousands of Boeing employees at a non-union worksite in South Carolina. You assert that you do not seek to close Boeing's operations in South Carolina;<sup>12</sup> yet, the relief requested would have that exact effect.<sup>13</sup> Indeed, three Boeing employees have filed to intervene in the case, to oppose the lawsuit because of the "draconian remedy that it seeks, which is, in essence, the closure of their work site and their discharge from employment in South Carolina."<sup>14</sup>

Finally, even if an agency is concerned that certain Congressional oversight may border on Congressional intervention, it is not the agency's claim to make.<sup>15</sup> Instead, it is the right of a private party to the agency action's to raise it, in federal court, after the agency renders a final decision.<sup>16</sup> In that instance, courts recognize that Congressional committees serve an important oversight and investigative function, and they have a legitimate interest in the "objective and efficient operation of regulatory agencies...with which [courts] should not lightly interfere."<sup>17</sup> Here, the number of jobs at risk, as a result

---

<sup>8</sup> *Id.* (At the Congressional hearing, the Chairman of the FTC announced he would disqualify himself from further participation in the case after questioning involved his mental processes).

<sup>9</sup> *Koniag v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978).

<sup>10</sup> National Labor Relations Board, The NLRB Process, available at <http://www.nlr.gov/nlr-process> (last visited June 4, 2011).

<sup>11</sup> Letter from Celeste J. Mattina, Acting Deputy General Counsel, National Labor Relations Board to Reps. Darrell Issa, Dennis Ross, and Trey Gowdy (May 27, 2011).

<sup>12</sup> National Labor Relations Board, Fact Check Archives, available at <http://www.nlr.gov/news-media/fact-check/fact-check-archives> (last visited June 6, 2011).

<sup>13</sup> Letter from J. Michael Luttig, Executive Vice President and General Counsel, Boeing, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (May 3, 2011).

<sup>14</sup> Motion to Intervene, *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-34231.

<sup>15</sup> See CRS Memorandum, *Application of Pillsbury Doctrine to Congressional Oversight Inquiries*, by Todd Tatelman (May 2011).

<sup>16</sup> *Id.*

<sup>17</sup> *Gulf Oil Corp. v. Federal Power Com.*, 563 F.2d 588 (3<sup>rd</sup> Cir. 1977).

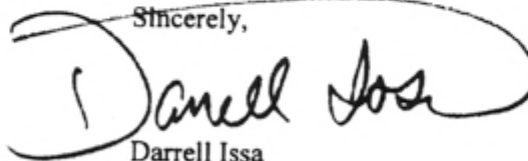


Mr. Lafe Solomon  
June 7, 2011  
Page 3

of the Complaint, is certainly a legitimate interest that Congress has the power and duty to investigate.

In light of this information, I ask that you reconsider my invitation to testify at the Friday, June 17, 2011, hearing in North Charleston, South Carolina, and that the Committee will not have to consider the use of the compulsory process. I ask that you respond to this invitation to appear no later than 10:00 a.m., Friday, June 10. If you have any questions, please contact Rob Borden or Kristina Moore of the Committee staff at 202-225-5074.

Sincerely,

A handwritten signature in black ink, appearing to read "Darrell Issa", enclosed within a large, loopy oval flourish.

Darrell Issa  
Chairman

cc: The Honorable Elijah Cummings, Ranking Member  
Committee on Oversight and Government Reform



United States Government

**NATIONAL LABOR RELATIONS BOARD**

1099 14<sup>th</sup> STREET NW  
WASHINGTON DC 20570

June 3, 2011

The Honorable Darrell Issa  
Chairman, Committee on Oversight  
and Government Reform  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Dear Chairman Issa:

I write in response to your recent invitation to testify before the full Committee on Friday, June 17, 2011, in North Charleston, South Carolina, concerning my recent decision to issue a complaint alleging the Boeing Company engaged in certain discriminatory behavior. Because my appearance at this hearing could threaten the rights of the parties to a fair trial, I must respectfully decline your invitation.

Your inquiry concerns an open case that is scheduled to be tried before an administrative law judge in Seattle, Washington beginning June 14, 2011. That trial will almost certainly be in progress when your Committee gathers in South Carolina only three days later. As Acting General Counsel of the National Labor Relations Board, I am ultimately responsible for overseeing the litigation in Seattle and for making all strategic decisions related to the prosecution of this case.

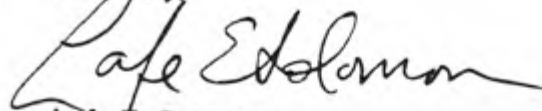
Courts have noted the danger to the due process rights of litigants to an administrative proceeding posed by Congressional hearings and other interventions that "focus[] directly and substantially upon the mental decisional process" of the decision-makers in an ongoing case. *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952, 964 (5<sup>th</sup> Cir. 1966); see also *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983); see also *SEC v. Wheeling-Pittsburg Steel Corp.*, 648 F.2d 118 (3d Cir. 1981) (court found that Congressional hearing focusing on target of an administrative enforcement proceeding was part of overwhelming evidence that administrative proceeding was being "subverted" by Congressional intervention in violation of the due process rights of a litigant to that proceeding). Indeed, independent agencies conducting legal administrative proceedings have a constitutional and statutory obligation to resist Congressional influence in order to protect the due process rights of the litigants to the proceeding. See, e.g., *Gulf*

*Oil Corporation v. FPC*, 563 F.2d 588 (3d Cir. 1977) (court found that Congressional intervention into the administrative process did not influence the agency because the agency did not accede to Congressional requests).

During the Seattle hearing, Boeing will have ample opportunity to review and challenge the evidence and legal theories that formed the basis of this complaint and to present evidence and legal arguments in its defense. Boeing and the International Association of Machinists and Aerospace Workers must be afforded due process protections and a right to a fair trial at all stages of this proceeding. Premature disclosure of information and arguments could have a negative impact on the rights of the litigating parties, breach assurances of confidentiality, and generally unduly interfere with an enforcement action.

As noted previously, in addition to providing the Committee with all public documents relevant to this case, my office will make available copies of the transcript and exhibits from the hearing, as well as post-hearing briefs filed by the parties, as soon as they are available. I sincerely hope that these documents will satisfy the Committee's legitimate informational needs while protecting the constitutional and statutory rights of the litigants in this case. If you have further questions, Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs (202 273-3700), would be happy to meet with you to discuss how we might accommodate further informational needs that you may have, consistent with our need to protect the integrity of our legal process.

Sincerely,



Lafe E. Solomon  
Acting General Counsel

cc: The Honorable Elijah Cummings  
Ranking Minority Member  
Committee on Oversight and  
Government Reform  
U.S. House of Representatives  
2471 Rayburn House Office Building  
Washington, DC 20515

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2011 MAY 22 AM 10:00

May 26, 2011

Mr. Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570-0001

Dear Mr. Solomon:

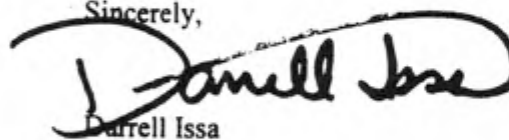
The Committee on Oversight and Government Reform hereby requests your testimony at a full Committee hearing on Friday, June 17, 2011, at 2:00 p.m., at the Charleston County Council Chambers, The Lonnie Hamilton Building, 4045 Bridge View Drive, North Charleston, South Carolina. The hearing is entitled, "Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise."

The hearing will explore the National Labor Relations Board's (NLRB) recent decision to sue The Boeing Company for alleged unfair labor practices connected to the company's decision to build "Dreamliner" 787s in South Carolina. The Committee asks you to provide testimony about the NLRB's action against Boeing and how its actions could impact the thousands of Boeing employees at a non-union worksite in South Carolina.

You should be prepared to provide a five-minute opening statement and answer questions posed by Members. Instructions for witnesses appearing before the Committee are contained in the enclosed Witness Instruction Sheet. In particular, please note the procedures for submitting written testimony at least two business days prior to the hearing.

We ask that you please contact the Committee by 5:00 p.m. on June 2, 2011, to confirm your attendance. If you have any questions, please contact Kristina Moore or Kristin Nelson of the Committee majority staff at (202) 225-5074.

Sincerely,

  
Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah Cummings, Ranking Minority Member  
Committee on Oversight and Government Reform

### Witness Information Sheet for Field Hearings

The following is a summary of some of the pertinent rules and procedures applicable to witnesses testifying before the Committee on Oversight and Government Reform:

- Witnesses should bring 30 copies of their written testimony to the field hearing. In addition, witnesses should provide their statement in electronic format, via e-mail to Gwen D'Luzansky at [Gwen.D'Luzansky@mail.house.gov](mailto:Gwen.D'Luzansky@mail.house.gov) by 10:00 a.m., **two days prior** to the hearing.
- Witnesses must complete the attached "Truth in Testimony" disclosure and certification. Additional pages may be attached to the form if needed. Witnesses must also include a resume or curriculum vitae. This disclosure and biographical information is required by House Rules. (House Rule XI, clause 2(g)(5)).
- Witnesses "Truth in Testimony" disclosure and biographical information should be attached to all 20 copies of the testimony **and included with the electronic copy** of the testimony provided to Gwen D'Luzansky.
- Written testimony and "Truth in Testimony" disclosure and certification form will be made publicly available and will be posted on the Committee's website. It is therefore recommended that personally identifiable information such as addresses and phone numbers not be included in the biographical information.
- At the hearing, each witness will be asked to summarize his or her written testimony in five minutes or less in order to maximize the time available for discussion and questions. Written testimony will be entered into the hearing record and may extend to any reasonable length.
- The Committee does not provide financial reimbursement for witness travel or accommodations.
- Witnesses with extenuating circumstances; however, may submit a written request for such reimbursements to Robin Butler, Financial Administrator, 2157 Rayburn House Office Building, at least one week prior to the hearing. Reimbursements will not be made without prior approval.
- Witnesses with disabilities should contact Committee staff to arrange any necessary accommodations.
- Committee Rules governing this hearing are online at [www.oversight.house.gov](http://www.oversight.house.gov).
- The Committee on Oversight and Government Reform is the principal oversight committee in the U.S. House of Representatives. The jurisdiction of the Committee is set forth in the House Rules X, clauses 1(m), 2, 3, and 4.

For inquiries regarding these rules and procedures, please contact the Committee on Oversight and Government Reform at (202) 225-5074.



United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 27, 2011

The Honorable Darrell Issa, Chairman  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

The Honorable Dennis Ross, Chairman  
Subcommittee on Federal Workforce, U.S.  
Postal Service and Labor Policy  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

The Honorable Trey Gowdy, Chairman  
Subcommittee on Health Care, District of Columbia,  
Census and the National Archives  
Committee on Oversight and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Issa, Chairman Ross, and Chairman Gowdy:

I write in response to your May 12, 2011 letter to Acting General Counsel Lafe E. Solomon regarding the complaint issued on April 20, 2011, against the Boeing Company ("Boeing") and lawsuits authorized by the National Labor Relations Board ("NLRB" or "Board") against the states of Arizona and South Dakota. I will address each issue in turn.

### **Boeing**

As you know, Case 19-CA-32431 is an open enforcement action in which the NLRB has alleged that Boeing violated Section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"). This case is currently scheduled to be heard before an administrative law judge on June 14, 2011, less than three weeks from now. During that hearing, Boeing will have ample opportunity to review and challenge the evidence and legal theories



proffered by counsel for the Acting General Counsel, and to present evidence and legal arguments in its defense. Throughout this proceeding, both Boeing and the International Association of Machinists and Aerospace Workers ("Machinists") will be afforded due process protections and a right to a fair trial. We appreciate the Committee's need for information in the performance of its oversight responsibilities. At the same time, the Agency has an obligation to protect the integrity of its processes and the rights of parties who appear before it.

Your letter broadly seeks confidential and privileged information, internal deliberative materials, attorney work product, and settlement communications in this open enforcement action.

Under the NLRA, the Agency has no power to initiate investigations about potential violations of the Act; it acts only upon the filing of a charge by an interested person. Because it is dependent on individuals to provide necessary information, it has longstanding investigative and litigation procedures, approved by the courts, to encourage those who have relevant information to come forward without fear of exposure or threat of retaliation. When investigating unfair labor practice charges, the Agency elicits testimonial evidence under a promise of confidentiality and bars pre-trial discovery in its administrative hearings. Thus, in open cases, statements of witnesses obtained during the investigation are not disclosed unless the witness is called to testify at trial and, even then, are provided, only upon request, and only after the witness has testified on direct examination. Moreover, the investigative/litigation file contains material prepared by those working on the case, such as file notes revealing research, analysis, potential and actual recommendations and internal memoranda that form the basis for the Agency's decisions. All of these documents are not only protected by the deliberative process, but, along with drafts of pleadings and other litigation documents, are protected as attorney work product. In addition, the file contains the legal citations, analysis, and positions of the parties to this case, and other evidence provided by those parties. The Agency does not disclose documents containing attorney work product or evidence submitted by one party to any other party in the case during the course of the investigation. Premature disclosure of such material could seriously compromise the litigation and give one litigant an unfair advantage over another. Finally, in every unfair labor practice case deemed by the Acting General Counsel to warrant issuance of an administrative complaint, the Agency pursues settlement efforts before trial, which are memorialized in the file. The protection normally accorded such material is designed to encourage full exploration of the possibility of settlement without fear that disclosure of positions taken during settlement discussions will unduly prejudice a party at trial.

As the foregoing discussion demonstrates, most of the Agency's documents regarding the Boeing investigation are privileged material, the premature disclosure of which risks prejudice to the rights of litigants and witnesses involved in this matter. This Agency takes seriously its judicially mandated obligation to protect the due process rights of its litigants. See, e.g., *ATX, Inc., v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate

itself from Congressional intervention). The basic facts and legal theories of the Acting General Counsel's case are contained in a number of public documents: the complaint, the related press releases and a fact sheet, which are indexed and included in the enclosed thumb drive and are otherwise available on the NLRB's public website at <http://www.nlr.gov/node/443>. We are also providing you with two other public documents, the charge and the answer to the complaint filed in this case.

In addition, we would be happy to provide the Committee with copies of the transcript and exhibits from the hearing contemporaneous with their availability, as well as copies of the post-hearing briefs to be filed by all parties. The transcript will provide a detailed accounting of the exact nature of the case and the facts proffered in support and rebuttal, which frame the bases for all legal arguments. The briefs will clearly detail the precise precedent invoked and relied upon.

With respect to your request for communications between the Office of the General Counsel and the National Labor Relations Board referring or relating to the Office of the General Counsel's investigation of Boeing, there are no responsive documents.

#### **Lawsuits Against Arizona and South Dakota**

You have expressed an interest in "the Office of [the] General Counsel's investigations of union election laws in Arizona, South Carolina, South Dakota and Utah." By way of explaining your interest in this regard, your letter states:

[W]e note that you have directed the NLRB to file lawsuits against the states of Arizona and South Dakota. We understand that the NLRB seeks to invalidate constitutional amendments passed by these states protecting workers' rights to secret ballot elections. The NLRB is apparently seeking to administratively impose card check, now that efforts to pass card-check legislation have failed to gain support in Congress.

At the outset, I welcome this opportunity to respond to the misapprehension that, in bringing this litigation on behalf of the Board, the Agency is attempting to impose policies on these States with respect to a card check process that Congress has declined to enact. In fact, the opposite is the case. Since its enactment in 1935, the NLRA has afforded employees the right to designate a collective bargaining representative either through employer voluntary recognition using card check or through a secret ballot election. The Supreme Court has long recognized the availability of both options under the NLRA. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-310 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-599 (1969).

There are proposals presently before Congress that would amend the NLRA to eliminate the card check option, but those proposals have thus far failed to be enacted.

Thus, the litigation that is the subject of your inquiry is based on protecting existing federal law—the law that the Acting General Counsel is sworn to uphold. That well-established federal law, as previously noted, guarantees to all private sector employees, within the jurisdiction of the NLRB, a voluntary recognition option, often based on a card check, in addition to a secret ballot election option.

The appropriateness and legitimacy of this preemption litigation has been acknowledged by leading labor lawyers, who have expressed support for the Board's decision to prevent encroachment by individual states' constitutional amendments on the legitimacy of Congress' longstanding choice to provide employees, unions and employers alternative paths to employee representation guaranteed by the NLRA. For example, former NLRB General Counsel Arthur Rosenfeld, appointed by President George W. Bush, stated "Board law, of course, acknowledges other means such as voluntary recognition, card check, voice votes . . ." and "I have to applaud the Board's quick authorization, the quick action in authorizing the acting general counsel in order to protect the Board's jurisdiction." See *Emerging Trends at the National Labor Relations Board*, Hearing before the Subcommittee on Health, Employment, Labor and Pensions, Feb. 11, 2011 (112th Cong.) at p. 15 (<http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg64230/pdf/CHRG-112hhrg64230.pdf>). In addition, former Board Member Marshall Babson, appointed by President Reagan, is reported to have stated, "the [B]oard is duty-bound to sue the states . . . to preserve and protect its jurisdiction." See *States To Play Hardball In NLRB Secret Ballot Fight* - Law360, by Ben James, 2/3/2011 © 2003-2010, Portfolio Media, Inc. ([http://www.law360.com/print\\_article/221147?section=employment](http://www.law360.com/print_article/221147?section=employment)).

As to our "investigation" into this matter, I will start by explaining that the Office of the General Counsel's Special Litigation Branch serves as legal counsel to the Board and General Counsel. It gives advice on miscellaneous matters and represents the Board and the General Counsel in court when they become a party or amicus in cases other than those arising directly from the enforcement of Board Decisions and Orders. By way of example, attorneys from this Branch provided the Board and General Counsel with legal advice about and represented the Board in a number of litigated preemption cases, including *NLRB v. State of North Dakota*, 504 F. Supp. 2d 750, 753-754 (D.N.D. 2007) (relating to preemption of North Dakota law); *NLRB v. State of Ill. Dept. of Employment Sec.*, 988 F.2d 735 (7th Cir. 1993) (preemption of enforcement of Illinois law); as amicus in the U.S. Court of Appeals for the Ninth Circuit and joining the Solicitor General's Supreme Court brief in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (preemption of California statute); and as amicus in *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005) (preemption of county ordinance).

The AFL-CIO, by letter dated November 15, 2010 to the Acting General Counsel, asked the NLRB to consider whether the states' constitutional amendments are preempted by the NLRA. The AFL-CIO opined that the amendments are preempted and that the Board should commence a lawsuit to invalidate them pursuant to *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971). No factual investigation was conducted; rather the amendments were considered based upon their plain language, which was approved and made effective by the states.

As the Acting General Counsel explained in his March 22 letter to seven U.S. Senators who had inquired into this same matter: whether the Board takes any action with respect to state law arguably in conflict with federal law turns on a number of variables, including whether the matter is purely an issue of law that can be resolved by a court on pleadings presenting legal argument, whether an outside party requests the Board to present its views to a court, and staff resources. In response to the AFL-CIO inquiry, the Acting General Counsel requested that the Special Litigation Branch prepare an analysis of the preemption issues and make a recommendation. In due course, a legal memorandum was prepared and was submitted to the four members of the Board with the Acting General Counsel's recommendation. Concluding that the States' constitutional amendments were preempted by operation of the NLRA and the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2), a majority of the Board then authorized institution of a lawsuit against the states pursuant to *NLRB v. Nash-Finch Co.*, *supra*, if an amicable resolution could not be reached.

The NLRB and its General Counsels have consistently acted in this way upon receiving other similar requests from outside parties. For example, in response to a request from employer groups, the NLRB joined litigation to invalidate California law that would frustrate employer speech in response to union activity (*Chamber of Commerce v. Brown*, *supra*). More recently, in response to a recent request from the National Right to Work Legal Defense Foundation, the Acting General Counsel wrote to the Attorney General of the State of California questioning the legitimacy of California's "professional strikebreaker" law (Cal. Labor Code §§ 1130-1136.2), which prohibits and punishes employers who employ certain strikebreakers.

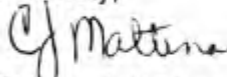
Consistent with the Agency's historic practice in preemption cases and on the basis of the Board's authorization, the Acting General Counsel, by letters dated January 13, 2011, advised the Attorneys General of Arizona, South Carolina, South Dakota, and Utah that their respective, recently-approved state constitutional amendments were preempted by the NLRA and the Supremacy Clause of the U.S. Constitution. On January 27, 2011, in a joint letter from the States of Arizona, South Carolina, South Dakota, and Utah to the Acting General Counsel of the National Labor Relations Board, the States' Attorneys General acknowledged that current federal law only "guarantees an election with secret ballots *if* the voluntary recognition option is not chosen." (emphasis added). In that same letter, the Attorneys General asserted that their constitutional amendments do not "require elections when federal law does not," but instead "support the current federal law . . . ."



On February 2, 2001, the Acting General Counsel sent a letter to the States' Attorneys General seeking to resolve the matter without the necessity of costly litigation; however, those attempts failed. On April 22, 2011, the Acting General Counsel notified the Attorneys General that the Board would initiate lawsuits in Arizona and South Dakota. The litigation that was initiated against the State of Arizona on May 6, 2011 by the Acting General Counsel at the direction of the Board is designed to ensure that both options afforded by federal law remain available in all 50 states, including in those states which have enacted measures that, fairly construed, would make secret ballot elections the only means of designating a collective bargaining representative. The Board's federal district court complaint expresses the Board's disagreement both with the Arizona Attorney General's claim that the Arizona Amendment is consistent with federal law, and with Arizona's assumption that states may establish their own procedures for enforcing the federal law that Congress assigned to the Board to administer. See NLRB Complaint filed in National Labor Relations Board v. State of Arizona (D.AZ. 11-cv-00913) at Para XIII, XV). I am providing the aforementioned January 13, 2011 letters from the Acting General Counsel to the four States' Attorneys General, the January 27, 2011 joint response from the Attorneys General, the February 2, 2011 and April 22, 2011 letters from the Acting General Counsel to the Attorneys General, the May 6, 2011 complaint issued against the State of Arizona, the November 15, 2010 letter from the AFL-CIO, the March 22, 2011 response from the Acting General Counsel to seven U.S. Senators, and a fact sheet, which are all indexed and included in the enclosed thumb drive. Many of these documents referring or relating to the litigation regarding the state amendments are publicly available and may also be accessed by going to the Agency's website at <https://mynlrb.nlr.gov>, and clicking on "Litigation regarding state amendments" under the heading "Fact Sheets".

I trust this information is responsive to your inquiry. If you have any further questions or need further assistance, please feel free to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at (202) 273-1700. We will be happy to meet with you to discuss how we might accommodate any further information requests you may have, consistent with our need to protect the integrity of our legal processes.

Sincerely,



Celeste J. Mattina  
Acting Deputy General Counsel

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Stephen Lynch, Ranking Minority Member,  
Subcommittee on Federal Workforce, U.S. Postal Service & Labor Policy

The Honorable Danny Davis, Ranking Minority Member,  
Subcommittee on Health Care, District of Columbia, Census and the National  
Archives

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

|                     |                       |
|---------------------|-----------------------|
| Case<br>19-CA-32431 | Date Filed<br>3/26/10 |
|---------------------|-----------------------|

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

|                                                                                       |                                                                  |                                         |
|---------------------------------------------------------------------------------------|------------------------------------------------------------------|-----------------------------------------|
| a. Name of Employer<br>The Boeing Company                                             |                                                                  | b. Tel. No.<br>206-862-9091             |
|                                                                                       |                                                                  | c. Cell No.                             |
| d. Address (Street, city, state, and ZIP code)<br>P. O. Box 3707<br>Seattle, WA 98124 | e. Employer Representative<br>Doug Kight                         | f. Fax No.<br>206-862-9001              |
|                                                                                       |                                                                  | g. e-Mail                               |
|                                                                                       |                                                                  | h. Number of workers employed<br>25,000 |
| i. Type of Establishment (factory, mine, wholesaler, etc.)<br>production facility     | j. Identify principal product or service<br>commercial airplanes |                                         |

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(3) and 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Within the last six months, The Boeing Company has:

(1) violated Section 8(a)(1) of the Act by threatening bargaining unit members represented by IAMAW District Lodge 751 because of their protected activity;

(2) violated Section 8(a)(5) of the Act by failing to bargain in good faith with District Lodge 751; and

(3) violated Section 8(a)(3) by beginning the process of transferring work from plants employing District Lodge 751 members to a new plant employing non-union workers in retaliation for bargaining unit workers' protected concerted activity.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)  
International Association of Machinists and Aerospace Workers District Lodge 751

|                                                                                                                                                                                |                                     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| 4a. Address (Street and number, city, state, and ZIP code)<br>c/o Schwerin Campbell Barnard Iglitzin & Lavitt LLP<br>18 West Mercer Street, Ste. 400<br>Seattle, WA 98119-3971 | 4b. Tel. No.<br>206-285-2828        |
|                                                                                                                                                                                | 4c. Cell No.                        |
|                                                                                                                                                                                | 4d. Fax No.<br>206-378-4132         |
|                                                                                                                                                                                | 4e. e-Mail<br>barnard@workerlaw.com |

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Association of Machinists and Aerospace Workers

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Kathleen Phair Barnard Kathleen Phair Barnard, Attorney  
(signature of representative or person making charge) (Print/type name and title or office, if any)

Tel. No.  
206-285-2828

Office, if any, Cell No.

Fax No.  
206-378-4132

e-Mail  
barnard@workerlaw.com

Address 18 W. Mercer St. Ste. 400, Seattle WA 98119 3/26/10  
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of the information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

ORIGINAL



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS

**COMPLAINT AND NOTICE OF HEARING**

International Association of Machinists and Aerospace Workers District Lodge No. 751 ("Local 751" or the "Union"), affiliated with International Association of Machinists and Aerospace Workers ("IAM"), has charged in Case 19-CA-32431 that The Boeing Company ("Respondent" or "Boeing"), has been engaging in unfair labor practices as set forth in the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*

Based thereon, the Acting General Counsel of the National Labor Relations Board (the "Board"), by the undersigned, pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by the Union on March 26, 2010, and was served on Respondent by regular mail on or about March 29, 2010.

2.

(a) Respondent, a State of Delaware corporation with its headquarters in Chicago, Illinois, manufactures and produces military and commercial aircraft at various facilities throughout the United States, including in Everett, Washington (the "facility"), and others in the Seattle, Washington, and Portland, Oregon, metropolitan areas.

(b) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), both sold and shipped from, and purchased and received at, the facility goods valued in excess of \$50,000 directly to and from points outside the State of Washington.

(d) Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

3.

The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of

§ 2(11) of the Act, and/or agents within the meaning of § 2(13) of the Act, acting on behalf of Respondent:

|               |   |                                                                                                                                                                       |
|---------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Jim Albaugh   | — | Executive Vice President, Boeing; President and CEO of Integrated Defense Systems (until late August 2009); CEO, Boeing Commercial Airplanes (as of late August 2009) |
| Scott Carson  | — | Executive Vice President, Boeing; CEO, Boeing Commercial Airplanes (until late August 2009)                                                                           |
| Ray Conner    | — | Vice President and General Manager of Supply Chain Management and Operations, Boeing Commercial Airplanes                                                             |
| Scott Fancher | — | Vice President and General Manager of the 787 Program                                                                                                                 |
| Fred Kiga     | — | Vice President, Government and Community Relations                                                                                                                    |
| Doug Kight    | — | Vice President, Human Resources, Boeing Commercial Airplanes                                                                                                          |
| Jim McNerney  | — | President, Chairman, and CEO                                                                                                                                          |
| Jim Proulx    | — | Boeing spokesman                                                                                                                                                      |
| Pat Shanahan  | — | Vice President and General Manager of Airplane Programs                                                                                                               |
| Gene Woloshyn | — | Vice President, Employee Relations                                                                                                                                    |

5.

(a) Those employees of Respondent enumerated in Section 1.1(a) of the collective bargaining agreement described below in paragraph 5(c), including, *inter alia*, all production and maintenance employees in Washington State, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Puget Sound Unit").

(b) Those employees of Respondent enumerated in Section 1.1(c) of the collective bargaining agreement described below in paragraph 5(c), including, *inter*

*alia*, all production and maintenance employees in the Portland, Oregon area, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Portland Unit").

(c) Since at least 1975 and at all material times, the IAM has been the designated exclusive collective bargaining representative of the Puget Sound Unit and the Portland Unit (collectively, the "Unit") and recognized as such representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 2, 2008, to September 8, 2012.

(d) Since 1975, during the course of the parties' collective-bargaining relationship, the IAM engaged in strikes in 1977, 1989, 1995, 2005, and 2008.

6.

On or about the dates and by the manner noted below, Respondent made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes:

(a) October 21, 2009, by McNerney in a quarterly earnings conference call that was posted on Boeing's intranet website for all employees and reported in the Seattle Post Intelligencer Aerospace News and quoted in the Seattle Times, made an extended statement regarding "diversifying [Respondent's] labor pool and labor relationship," and moving the 787 Dreamliner work to South Carolina due to "strikes happening every three to four years in Puget Sound."

(b) October 28, 2009, based on its October 28, 2009, memorandum entitled "787 Second Line, Questions and Answers for Managers," informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce Respondent's vulnerability to delivery disruptions caused by work stoppages.

(c) December 7, 2009, by Conner and Proulx in an article appearing in the Seattle Times, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(d) December 8, 2009, by Conner in an article appearing in the Puget Sound Business Journal, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(e) March 2, 2010, by Albaugh in a video-taped interview with a Seattle Times reporter, stated that Respondent decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.

7.

(a) In or about October 2009, on a date better known to Respondent, but no later than October 28, 2009, Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit to its non-union site in North Charleston, South Carolina.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 7(a), combined with the conduct described above in paragraph 6, is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

8.

(a) In or about October 2009, on a date better known to Respondent, but no later than December 3, 2009, Respondent decided to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit to its non-union facility in North Charleston, South Carolina, or to subcontractors.

(b) Respondent engaged in the conduct described above in paragraph 8(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 8(a), combined with the conduct described above in paragraphs 6 and 7(a), is also inherently destructive of the rights guaranteed employees by § 7 of the Act.



9.

By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

10.

By the conduct described above in paragraphs 7 and 8, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(3) and (1) of the Act.

11.

By the conduct described above in paragraphs 6 through 10, Respondent has engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

12.

As part of the remedy for the unfair labor practices alleged herein, the Acting General Counsel seeks an Order requiring either that one of the high level officials of Respondent alleged to have committed the violations enumerated above in paragraph 6 read, or that a designated Board agent read in the presence of a high level Boeing official, any notice that issues in this matter, and requiring Respondent to broadcast such reading on Respondent's intranet to all employees.

13.

(a) As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent

to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities.

(b) Other than as set forth in paragraph 13(a) above, the relief requested by the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to this Complaint. The answer must be **received by this office on or before May 4, 2011, or postmarked on or before May 3, 2011.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at **[www.nlr.gov](http://www.nlr.gov)**, click on ***File Case Documents***, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due

date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in this Complaint are true.

#### **NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on the 14<sup>th</sup> day of June, 2011, at 9:00 a.m., in James C. Sand Hearing Room, 2966 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in

this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

**DATED** at Seattle, Washington, this 20<sup>th</sup> day of April, 2011.

A handwritten signature in dark ink, appearing to read "Richard L. Ahearn", is written over a horizontal line.

Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174-1078

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO  
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

*(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)*

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8½ by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board:

No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**NOTICE**

The Boeing Company  
Case: 19-CA-32431

20 April 2011

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 C.F.R. 102.16(a) or with the Division of Judges when appropriate under 29 C.F.R. 102.16(b).
- (2) Grounds must be set forth in **detail**;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Certified Mail: 7006 3450 0001 6746 5471

THE BOEING COMPANY  
Attn: Douglas P. Kight, Attorney  
PO Box 3707, MS 13-08  
Seattle, WA 98124-2207

Regular Mail:

WILLIAM J. KILBERG, ATTORNEY  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Ave, NW  
Washington, DC 20036-5306  
Email: [wkilberg@givsondunn.com](mailto:wkilberg@givsondunn.com)

DREW E. LUNT, ATTORNEY  
MCKENNA LONG & ALDRIDGE LLP  
303 Peachtree St NE, Suite 5300  
Atlanta, GA 30308-3265  
Email: [dlunt@mckennalong.com](mailto:dlunt@mckennalong.com)

RICHARD B. HANKINS, ATTORNEY  
MCKENNA LONG & ALDRIDGE LLP  
303 Peachtree St NE, Suite 5300  
Atlanta, GA 30308-3265  
Email: [rhankins@mckennalong.com](mailto:rhankins@mckennalong.com)

Regular Mail:

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS DISTRICT  
LODGE 751  
Attn: Jesse Cote, Business Agent  
9135 15<sup>th</sup> Pl S  
Seattle, WA 98108-5100

DAVID CAMPBELL, ATTORNEY  
SCHWERIN CAMPBELL BARNARD IGLITZIN &  
LAVITT LLP  
18 W Mercer St, Suite 400  
Seattle, WA 98119-3971  
Email: [Campbell@workerlaw.com](mailto:Campbell@workerlaw.com)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS DISTRICT LODGE 751, affiliated  
with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS

**ANSWER**

Respondent The Boeing Company ("Boeing"), by their undersigned attorneys, for their Answer to the Complaint and Notice of Hearing ("Complaint") filed by the Acting General Counsel of the National Labor Relations Board ("NLRB"), states as follows:

**GENERAL DENIAL**

Except as otherwise expressly stated herein, Boeing denies each and every allegation contained in the Complaint, including, without limitation, any allegations contained in the preamble, headings, or subheadings of the Complaint, and Boeing specifically denies that it violated the National Labor Relations Act ("NLRA") in any of the manners alleged in the Complaint or in any other manner. Pursuant to Section 102.20 of the Board's rules, averments in the Complaint to which no responsive pleading is required shall be deemed as denied. Boeing expressly reserves the right to seek to amend and/or supplement its Answer as may be necessary.

## DEFENSES

Without assuming any burden of proof, persuasion or production not otherwise legally assigned to it as to any element of the claims alleged in the Complaint, Boeing asserts the following defenses.

1. The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.
2. The statements cited in Paragraphs 6(a)-6(e) of the Complaint are protected statements under Section 8(c) of the NLRA and under the First Amendment to the United States Constitution and are not admissible to show any violation of the NLRA.
3. Boeing's decision to place the second 787 assembly line in North Charleston was based upon a number of varied factors, including a favorable business environment in South Carolina for manufacturing companies like Boeing; significant financial incentives from the State of South Carolina; achieving geographic diversity of its commercial airline operations; as well as to protect the stability of the 787's global production system. In any event, even ascribing an intent to Boeing that it placed the second line in North Charleston so as to mitigate the harmful economic effects of an anticipated future strike would not be evidence that the decision to place the second assembly line in North Charleston was designed to retaliate against the IAM for past strikes. Nevertheless, Boeing would have made the same decisions with respect to the placement of the second assembly line in North Charleston even if it had not taken into consideration the damaging impact of future strikes on the production of 787s.
4. Even if the actions described in the Complaint had constituted movement or transfer of work, which allegations Boeing expressly denies, the International Association of Machinists and Aerospace Workers District Lodge 751, affiliated with International Association

of Machinists and Aerospace workers (the "IAM") waived any rights it had with respect to such actions by virtue of the language of Section 21.7 of the collective bargaining agreement between Boeing and the IAM.

5. Boeing has not violated Section 8(a)(3) of the NLRA as it has not discriminated in the hire, wages, tenure, or terms or conditions of employment of any Unit member.

6. Boeing's alleged conduct was not inherently destructive of employees' rights under the NLRA because, *inter alia*, in its collective bargaining agreement with Boeing, the IAM expressly agreed that Boeing has the right to place work in any location of its choice without the need to bargain with the IAM, and because an intent to mitigate the adverse economic impact of an anticipated future strike is not inherently destructive of protected employee rights under the NLRA.

7. Boeing has not violated Section 8(a)(1) of the NLRA as it has not interfered with, restrained, or coerced employees represented by the IAM in the exercise of their rights protected by the NLRA.

8. The remedy requested in the Complaint is impermissibly punitive and would cause an undue hardship on Boeing, its employees, and the State of South Carolina. Moreover, none of the complained of actions caused any hardship on any Boeing employees or the State of Washington.

9. The remedy requested in Paragraph 13(a) of the Complaint is impermissibly retroactive because its legal basis represents a radical and not reasonably anticipated departure from current Board and court precedent.

10. The remedy requested in Paragraph 12 of the Complaint is improper because Boeing has not violated Section 8(a)(1) of the NLRA.

11. The remedy requested in Paragraph 13(a) of the Complaint is impermissible because it does not seek a restoration of the status quo.

12. Contrary to what the Complaint alleges in Paragraph 13(b), the remedy sought in Paragraph 13(b) would effectively cause Boeing to close its assembly facility in North Charleston, South Carolina.

13. Some or all of the claims asserted in the Complaint are barred by the six month statute of limitations set forth in Section 10(b) of the NLRA.

14. The Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed.

#### **RESPONSE TO SPECIFIC ALLEGATIONS OF THE COMPLAINT**

AND NOW, incorporating the foregoing, Boeing states as follows in response to the specific allegations of the Complaint:

Preamble: Boeing denies the allegations contained in the preamble, except to admit that District Lodge 751, affiliated with the International Association of Machinists and Aerospace Workers ("IAM") has charged in case 19-CA-32431 that Boeing has engaged in certain unfair labor practices prohibited by the NLRA, and that the Acting General Counsel of the NLRB has issued this Complaint and Notice of Hearing based upon the IAM's charge.

1. Boeing lacks information and knowledge sufficient to form a belief as to the allegations of Paragraph 1, except to admit that, on or around March 29, 2010, it received by regular mail a charge, designated as Case No. 19-CA-32431.

2. (a) Boeing admits the allegations of Paragraph 2(a).

(b) Boeing denies the allegations of Paragraph 2(b), except to admit that in the last twelve months its business operations resulted in gross revenues in excess of \$500,000.

(c) Boeing denies the allegations of Paragraph 2(c), except to admit that during the last twelve months it received, shipped, sold and/or purchase goods at its facilities in the State of Washington valued in excess of \$50,000 from places outside of the State of Washington.

(d) Boeing denies the allegations of Paragraph 2(d), except to admit that it is and has been an employer engaged in commerce.

3. Boeing admits the allegations of Paragraph 3.

4. The first sentence of Paragraph 4 states legal conclusions for which no answer is required. As to the remaining allegations in Paragraph 4, Boeing admits that the identified individuals are or were either agents or supervisors, and that they held the following positions in October 2009:

- James ("Jim") F. Albaugh: Executive Vice President, The Boeing Company; Chief Executive Officer, Boeing Commercial Airplanes
- Scott Carson: Executive Vice President, The Boeing Company; Chief Executive Officer, Boeing Commercial Airplanes (until August 2009)
- Raymond L. Conner: Vice President and General Manager of Supply Chain Management and Operations, Boeing Commercial Airplanes
- Scott Fancher: Vice President and General Manager, Boeing 787 Dreamliner Program, Boeing Commercial Airplanes
- Frederick C. Kiga: Vice President, State and Local Government Relations and Global Corporate Citizenship for the Northwest Region, Boeing Commercial Airplanes



- Douglas P. Kight: Vice President, Human Resources, Boeing Commercial Airplanes
- W. James ("Jim") McNerney, Jr.: Chairman of the Board, President, and Chief Executive Officer, The Boeing Company
- James Proulx: Manager, Boeing Commercial Airplanes News and Media
- Patrick ("Pat") Shanahan: Vice President and General Manager, Airplane Programs, Boeing Commercial Airplanes
- Eugene Woloshyn: Vice President, Labor Relations, The Boeing Company

5. (a) The allegations contained in Paragraph 5(a) state legal conclusions for which no response is required, but to the extent a response is required, Boeing admits that the production and maintenance employees in Washington State constituted a "Unit" for collective bargaining purposes.

(b) The allegations contained in Paragraph 5(b) state legal conclusions for which no response is required, but to the extent a response is required, Boeing admits that the production and maintenance employees in the Portland, Oregon area constitute a "Unit" for collective bargaining purposes.

(c) Boeing admits the allegations of Paragraph 5(c).

(d) Boeing admits the allegations of Paragraph 5(d).

6. Boeing denies the introductory sentence to Paragraph 6, and specifically denies that, it "removed" or "had removed work" from its facilities in Everett, Washington or Portland, Oregon because Unit employees had struck Boeing, and also specifically denies that it threatened or impliedly threatened that those facilities would lose additional work in the event of future Unit strikes. As to the lettered subparagraphs:

(a) Boeing denies the allegations of Paragraph 6(a), except to admit that its President, Chairman and CEO James McNerney, participated in an earnings conference call on October 21, 2009; and Boeing specifically denies that Mr. McNerney made an "extended statement" or any statement about moving 787 Dreamliner work to South Carolina due to "strikes happening every three or four years in Puget Sound." Boeing admits that the referenced newspaper articles appeared in *The Seattle Post-Intelligencer* and *The Seattle Times*.

(b) Boeing denies the allegations of Paragraph 6(b), and further states that the referenced October 28, 2009 memorandum speaks for itself.

(c) Boeing denies the allegations of Paragraph 6(c), except to admit that the referenced newspaper article appeared in *The Seattle Times* on December 7, 2009.

(d) Boeing denies the allegations of Paragraph 6(d), except to admit that the referenced newspaper article appeared in *The Puget Sound Business Journal* on December 8, 2009.

(e) Boeing denies the allegations of Paragraph 6(e), except to admit that a Seattle Times reporter conducted a video-taped interview of Mr. Albaugh and that the tape speaks for itself.

7. (a) Boeing denies the allegations of Paragraph 7(a), and specifically denies that it transferred the "second 787 Dreamliner" assembly line from its facility in Everett, Washington to a facility to be constructed in North Charleston, South Carolina, and except to state that on October 28, 2009, Boeing announced that it would place a new second assembly line for the 787 Dreamliner in North Charleston, South Carolina.

(b) Boeing denies the allegations of Paragraph 7(b).

(c) Boeing denies the allegations of Paragraph 7(c).

8. (a) Boeing denies the allegations of Paragraph 8(a), and specifically denies that it transferred a sourcing supply program for the 787 Dreamliner assembly line from its facilities in Portland, Oregon to North Charleston, South Carolina.

(b) Boeing denies the allegations of Paragraph 8(b).

(c) Boeing denies the allegations of Paragraph 8(c).

9. Boeing denies the allegations contained in Paragraph 9.

10. Boeing denies the allegations contained Paragraph 10.

11. Boeing denies the allegations contained in Paragraph 11.

12. Paragraph 12 does not allege facts for which an answer is required, but relates the remedy sought by the Acting General Counsel and, accordingly, no response is required. However, to the extent that a response may be deemed to be necessary, Boeing denies that the Acting General Counsel is entitled to, or that the Board can order the remedy requested in Paragraph 12.

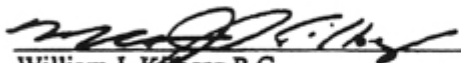
13. (a) Paragraph 13(a) does not allege facts for which an answer is required, but relates the remedy sought by the Acting General Counsel and, accordingly, no response is required. However, to the extent that a response may be deemed to be necessary, Boeing denies that the Acting General Counsel is entitled to the remedy, or that the Board can order the remedy requested in Paragraph 13(a).

(b) Paragraph 13(b) does not allege facts for which an answer is required but merely describes what the Acting General Counsel says is not part of the remedy he is seeking. To the extent that a response may be deemed to be necessary, Boeing denies that the Acting General Counsel has correctly stated that the remedy sought in Paragraph 13(a) will not effectively cause Boeing's assembly facility in North Charleston to shut down.

Boeing reserves the right to raise any additional defenses not asserted herein of which they may become aware through investigation, as may be appropriate at a later time.

Respectfully Submitted,

Dated: May 4, 2011

  
William J. Kenberg P.C.  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue N.W.  
Washington, District of Columbia 20036  
Telephone: 202.955.8500  
Facsimile: 202.467.0539

Richard B. Hankins  
MCKENNA LONG & ALDRIDGE  
303 Peachtree Street, N.E.  
Atlanta, Georgia 30308  
Telephone: 404.527-4000  
Facsimile: 404.527-4198

Attorneys for The Boeing Company

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS DISTRICT LODGE 751, affiliated  
with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS

**CERTIFICATE OF SERVICE**

I certify that a copy of Respondent's Answer was electronically served on May 4, 2011  
and sent by overnight mail to the following parties:

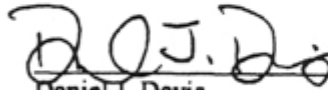
Richard L. Ahearn  
Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174-1078  
Richard.Ahearn@nlrb.gov

Mara-Louise Anzalone  
Counsel for the Acting General Counsel  
National Labor Relations Board  
915 2<sup>nd</sup> Avenue, Suite 2948  
Seattle, Washington 98174-1078  
Mara-Louise.Anzalone@nlrb.gov

David Campbell  
Carson Glickman-Flora  
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT LLP  
18 West Mercer Street, Suite 400  
Seattle, Washington 98119  
Campbell@workerlaw.com  
Flora@workerlaw.com

Counsel for IAM

DATED this 4<sup>th</sup> day of May, 2011

A handwritten signature in black ink, appearing to read "D.J. Davis", written over a horizontal line.

Daniel J. Davis  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, NW  
Washington, D.C. 20036-5303  
DDavis@Gibsondunn.com



[Home](#) • [Boeing Complaint Fact Sheet](#)

## Boeing Complaint Fact Sheet

On April 20, 2011, the Acting General Counsel of the National Labor Relations Board issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second airplane production line from a union facility in the state of Washington to a non-union facility in South Carolina for discriminatory reasons. A hearing has been set for June 14, 2011 in Seattle before an administrative law judge.

[Click here to see a news release about the complaint](#), and [here to see a copy of the full complaint](#).

[Click here to view Boeing's response to the complaint](#).

### The Charge and Complaint

On March 26, 2010, the International Association of Machinists and Aerospace Workers, District Lodge 751, filed a charge with the NLRB alleging that the Boeing Company had engaged in multiple unfair labor practices related to its decision to place a second production line for the 787 Dreamliner airplane in a non-union facility.

Specifically, the union charged that the decision to transfer the line was made to retaliate against union employees for participating in past strikes and to chill future strike activity, which is protected under the National Labor Relations Act.

The union also charged that the company violated the National Labor Relations Act by failing to negotiate over the decision to transfer the production line. The Machinists' union has represented Boeing Company employees in the Puget Sound area of Washington, where the planes are assembled, since 1936, and in Portland, Oregon, where some airplane parts are made, since 1975.

Throughout the investigation of the charge, NLRB officials met with both parties in efforts to facilitate a settlement agreement. The overwhelming majority of NLRB charges found to have merit are settled by agreement. Although no settlement was reached and the Agency was compelled to pursue litigation, the Acting General Counsel remains open to a resolution between the parties.

The complaint issued by the Acting General Counsel (19-CA-32431) alleges that Boeing violated two sections of the National Labor Relations Act by making coercive statements and threats to employees for engaging in statutorily protected activities, and by deciding to place the second line at a non-union facility, and establish a parts supply program nearby, in retaliation for past strike activity and to chill future strike activity by its union employees.

The investigation found that Boeing officials communicated the unlawful motivation in multiple statements to employees and the media. For example, a senior Boeing official said in a videotaped interview with the Seattle Times newspaper: "The overriding factor (in transferring the line) was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years."

The complaint also alleges that Boeing's actions were "inherently destructive of the rights guaranteed employees by Section 7 of the Act."

The investigation did not find merit to the union's charge that Boeing failed to bargain in good faith over its decision regarding the second line. Although a decision to locate unit work would typically be a mandatory subject of bargaining, in this case, the union had waived its right to bargain on the issue in its collective bargaining agreement with Boeing.

### The Law and Supporting Cases

The NLRB enforces the National Labor Relations Act, which guarantees employees the right to organize and collectively bargain, or to refrain from doing so. Applicable Sections of the Act follow:

#### RIGHTS OF EMPLOYEES

**Section 7:** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities...

### In this Section

[Home](#)

[Rights We Protect](#)

[What We Do](#)

[Cases & Decisions](#)

[Who We Are](#)

[News & Media](#)

[Publications](#)

### Resources

[The NLRB Process](#)

[MyNLRB](#)

[Find a Case](#)

[File Case Documents](#)

[Graphs & Data](#)

[Find Your Regional Office](#)

[FAQs](#)

[Forms](#)

[National Labor Relations Act \(NLRA\)](#)

[Related Agencies](#)

### Get E-mail Updates

Sign up for updates or to access your subscriber preferences.

[SHARE](#) [Print](#)

## RIGHT TO STRIKE

Section 13: Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

## UNFAIR LABOR PRACTICES (relevant sections)

Section 8(a) It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

## Cases:

On the 8(a)(1) charge:

The U.S. Supreme Court delineated the line between protected employer speech versus unlawful employer speech under the NLRA in *NLRB v. Gissel Packing Corp.*, 395 US 575, 618 (1969).

In *General Electric Company*, 215 NLRB 520 (1974), the National Labor Relations Board applied the Gissel test to set aside an election because the employer, citing concerns about possible future strikes, stated that the plant's nonunion status was a primary factor in choosing to locate a production line for a new motor there. In its decision, the Board distinguished an employer's right to take defensive action when threatened with an imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date."

Since then, the Board has repeatedly held that an employer violates section 8(a)(1) by threatening that employees will lose their jobs if they join a strike, or by predicting a loss of business and jobs because of unionization or strike disruptions without any factual basis. In contrast, the Board has found that employers may lawfully relate concerns raised by customers (*Curwood, Inc.*, 339 NLRB 1137 (2003)). They may also reference the possibility that unionization, including strikes, might harm relationships with consumers, as opposed to predicting "unavoidable consequences." *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1075-76 (2004)

On the 8(a)(3) charge:

An employer's discouragement of its employees' participation in a legitimate strike constitutes discouragement of union membership within the meaning of this section. This applies to employer conduct designed to retaliate against employees for having engaged in a strike in the past (*Capehorn Industry*, 336 NLRB 364 (2001) where the employer failed to reinstate strikers when there was no legitimate business justification for permanently subcontracting the work), as well as employer conduct designed to forestall employees from exercising their right to strike in the future (*Century Air Freight*, 284 NLRB 730 (1987) where employer permanently subcontracted unit work and discharged employees in order to forestall the exercise of their right to strike; and *Westpac Electric*, 321 NLRB 1322 (1996), where employer isolated employee in retaliation for previous and anticipated future strike activities). In *National Fabricators* 295 NLRB 1095 (1989), where potential strikers were targeted for layoffs, the Board held that "disfavoring employees who were likely to strike, is the kind of coercive discrimination that...discourages...protected activity."

## Next Steps

It is important to note that the complaint states allegations by the Acting General Counsel that the employer has committed unfair labor practices. The Board has made no findings on these allegations. The next step in the process will be a hearing before an NLRB administrative law judge, scheduled for June 14 at the NLRB's Seattle office. At the hearing, both parties will have an opportunity to present evidence and argue in favor of their position. The decision of the judge may be appealed to the Board in Washington by the filing of exceptions by either party. The Board's decision could further be appealed to a federal court of appeals and then to the U. S. Supreme Court. Click here for a flow chart of the NLRB process.

This fact sheet was posted on 4/20/2011 and will be updated periodically.

Printer-friendly version

[Home](#) • [News & Media](#) • [News Releases](#)

## National Labor Relations Board issues complaint against Boeing Company for unlawfully transferring work to a non-union facility

April 20, 2011

### Contact:

Office of Public Affairs  
202-273-1991  
[publicinfo@nrlrb.gov](mailto:publicinfo@nrlrb.gov)  
[www.nrlrb.gov](http://www.nrlrb.gov)

NLRB Acting General Counsel Lafe Solomon today issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second production line to a non-union facility in South Carolina for discriminatory reasons.

Boeing announced in 2007 that it planned to assemble seven 787 Dreamliner airplanes per month in the Puget Sound area of Washington state, where its employees have long been represented by the International Association of Machinists and Aerospace Workers. The company later said that it would create a second production line to assemble an additional three planes a month to address a growing backlog of orders. In October 2009, Boeing announced that it would locate that second line at the non-union facility.

In repeated statements to employees and the media, company executives cited the unionized employees' past strike activity and the possibility of strikes occurring sometime in the future as the overriding factors in deciding to locate the second line in the non-union facility.

The NLRB launched an investigation of the transfer of second line work in response to charges filed by the Machinists union and found reasonable cause to believe that Boeing had violated two sections of the National Labor Relations Act because its statements were coercive to employees and its actions were motivated by a desire to retaliate for past strikes and chill future strike activity.

"A worker's right to strike is a fundamental right guaranteed by the National Labor Relations Act," Mr. Solomon said. "We also recognize the rights of employers to make business decisions based on their economic interests, but they must do so within the law. I have worked with the parties to encourage settlement in the hope of avoiding costly litigation, and my door remains open to that possibility."

To remedy the alleged unfair labor practices, the Acting General Counsel seeks an order that would require Boeing to maintain the second production line in Washington state. The complaint does not seek closure of the South Carolina facility, nor does it prohibit Boeing from assembling planes there.

Absent a settlement between the parties, the next step in the process will be a hearing before an NLRB administrative law judge in Seattle, set for June 14, at which both parties will have an opportunity to present evidence and arguments.

[Click here to view a fact sheet.](#)

[Printer-friendly version](#)

### Resources

[The NLRB Process](#)

[MyNLRB](#)

[Find a Case](#)

[File Case Documents](#)

[Graphs & Data](#)

[Find Your Regional Office](#)

[FAQs](#)

[Forms](#)

[National Labor Relations Act \(NLRA\)](#)

[Related Agencies](#)

[Get E-mail Updates](#)

[Sign up for updates or to access  
your subscriber preferences](#)

[SHARE](#) [v](#) [f](#) [t](#)

[Home](#) • [News & Media](#) • [News Releases](#)

## Acting General Counsel Life Solomon releases statement on Boeing complaint

May 09, 2011

**Contact:**

Office of Public Affairs  
202-273-1991  
[publicinfo@nrb.gov](mailto:publicinfo@nrb.gov)  
[www.nrb.gov](http://www.nrb.gov)

NLRB Acting General Counsel Life Solomon today responded to inquiries regarding a complaint issued April 20 against the Boeing Company with the following statement:

"Contrary to certain public statements made in recent weeks, there is nothing remarkable or unprecedented about the complaint issued against the Boeing Company on April 20. The complaint involves matters of fact and law that are not unique to this case, and it was issued only after a thorough investigation in the field, a further careful review by our attorneys in Washington, and an invitation by me to the parties to present their case and discuss the possibility of a settlement. Only then did I authorize the complaint alleging that certain statements and decisions by Boeing officials were discriminatory under our statute.

It is important to note that the issuance of a complaint is just the beginning of a legal process, which now moves to a hearing before an administrative law judge. That hearing, scheduled for June 14 in Seattle, is the appropriate time and place to argue the merits of the complaint. The judge's decision can further be appealed to the Board, and ultimately to the federal courts. At any point in this process, the parties could reach a settlement agreement and we remain willing to participate in any such discussions at the request of either or both parties. We hope all interested parties respect the legal process, rather than trying to litigate this case in the media and public arena."

Mr. Solomon made the same point today in a brief written response to a letter received earlier this month from Boeing General Counsel J. Michael Luttig.

For more information about the NLRB, please see our website at [www.nrb.gov](http://www.nrb.gov). Click [here to sign up for email delivery](#) of news releases and more.

[Printer-friendly version](#)

### Resources

[The NLRB Process](#)  
[MyNLRB](#)  
[Find a Case](#)  
[File Case Documents](#)  
[Graphs & Data](#)  
[Find Your Regional Office](#)  
[FAQs](#)  
[Forms](#)  
[National Labor Relations Act \(NLRA\)](#)  
[Related Agencies](#)

[Get E-mail Updates](#)  
Sign up for updates or to access  
your subscriber preferences

[SHARE](#) [Print](#)

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

May 12, 2011

Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, D.C. 20570-0001

Dear Mr. Solomon:

The Committee on Oversight and Government Reform is conducting oversight of recent legal actions taken by the Office of General Counsel of the National Labor Relations Board ("NLRB" or "Board"). We write to you concerning two issues.

First, on March 26, 2010, the International Association of Machinists and Aerospace Workers ("IAM") charged<sup>1</sup> that the Boeing Company ("Boeing" or "Respondent") engaged in unfair labor practices under the National Labor Relations Act (the "Act").<sup>2</sup> On April 20, 2011, after an investigation into the IAM's charges, you, as Acting General Counsel of the NLRB, issued a Complaint and Notice of Hearing against Boeing pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations.

Since 1975, the IAM has been designated the exclusive collective bargaining representative ("Unit") of Boeing's production and maintenance employees in Washington State and Portland, Oregon.<sup>3</sup> The most recent collective bargaining agreement between Boeing and the IAM has been in effect since November 2, 2008, and is effective until September 8, 2012.<sup>4</sup>

The Board's Complaint arises from Boeing's transfer of its second 787 Dreamliner production line of three planes per month from the Unit to its non-union site in North Charleston, South Carolina in October of 2009.<sup>5</sup> The Board charged Boeing with "interfering with, restraining, and coercing employees" in the exercise of their rights, "discriminating in regard to the hire or tenure or terms or conditions of employment of its employees," and engaging "in

<sup>1</sup> *Boeing and International Association of Machinists and Aerospace Workers District Lodge 751*, affiliated with *International Association of Machinists and Aerospace Workers*, before the National Labor Relations Board, Region 19, United States of America, Case No. 19-CA-32431 [hereinafter "Complaint"].

<sup>2</sup> 29 U.S.C. § 151 *et seq.*

<sup>3</sup> COMPLAINT, *supra* note 1 at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5.

unfair labor practices affecting commerce" therefore violating §§ 8(a)(3) and (1) and §§2(6) and (7) of the Act.<sup>6</sup> The Board found that Boeing "made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes."<sup>7</sup>

Boeing has responded that the Board's Complaint is legally frivolous – adding that the one thousand jobs Boeing created in South Carolina have not come at the expense of jobs in the State of Washington.<sup>8</sup> Furthermore, Boeing's South Carolina facility, which it announced plans to build seventeen months ago, is nearly complete.<sup>9</sup>

Peter Schaumber, the former chairman of the Board, has described the Board's move as "unprecedented."<sup>10</sup> Schaumber has argued "[t]he workers don't have any claim to the work. . . . If the workers don't have any claim to the work, it wasn't retaliatory to open a new second production line. . . . It is simply expanding its business operation."<sup>11</sup>

A letter from nine state Attorneys General – including Alan Wilson, the Attorney General of South Carolina – called on the Board to withdraw its complaint against Boeing, describing it as "an assault upon the constitutional right to free speech, and the ability of our states to create jobs and recruit industry."<sup>12</sup> The Attorneys General wrote, "[y]our ill-conceived retaliatory action seeks to destroy our citizens' right to work. It is South Carolina and Boeing today, but will be any of our states, with our right to work guarantees, tomorrow. . . . [t]his unparalleled and overreaching action seeks to drive a stake through the heart of the free enterprise system."<sup>13</sup>

Second, we note that you have directed the NLRB to file lawsuits against the states of Arizona and South Dakota.<sup>14</sup> We understand that the NLRB seeks to invalidate constitutional amendments passed by these states protecting workers' rights to secret ballot elections. The NLRB is apparently seeking to administratively impose card check,<sup>15</sup> now that efforts to pass

---

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> PRESS RELEASE, BOEING COMPANY, *Boeing to Fight NLRB Complaint Back by Union*, (Apr. 20, 2011), available at <http://boeing.mediaroom.com/index.php?s=43&item=1714> (last visited May 2, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> Judson Berger, *Ex-Labor Board Chairman: Union-Backed Case Against Boeing 'Unprecedented'*, FOXNEWS, (Apr. 26, 2011), available at <http://www.foxnews.com/politics/2011/04/26/ex-labor-board-chairman-union-backed-case-boeing-unprecedented> (last visited Apr. 30, 2011).

<sup>11</sup> *Id.*

<sup>12</sup> LETTER, Alan Wilson, Attorney General of South Carolina, *et al.*, to Lafe E. Solomon, Acting General Counsel, National Labor Relations Board (Apr. 28, 2011) at 1.

<sup>13</sup> *Id.*

<sup>14</sup> Letter, Lafe Solomon, Acting General Counsel, NLRB, to Attorney Generals of Arizona, South Dakota, Utah, and South Carolina (Apr. 22, 2011). See also Melanie Trotman, *Labor Board Warns on Secret Ballots*, WALL STREET J., (Jan. 15, 2011), available at [http://online.wsj.com/article/SB10001424052748704637704576082334037133042.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052748704637704576082334037133042.html?mod=googlenews_wsj) (last visited Mar. 1, 2011).

<sup>15</sup> See Editorial, *Back Door Card Check*, WALL STREET J., Sept. 14, 2010, at A20 (suggesting Craig Becker will push the NLRB to implement card check through the adjudicatory process).



card-check legislation have failed to gain support in Congress.<sup>16</sup> You are currently challenging the authority of states to protect workers' rights to secret-ballot elections before their jobs can be unionized. You seek to invalidate constitutional amendments passed in Arizona and South Dakota protecting workers' rights to secret ballot elections reserving the right to also sue the states of Utah and South Carolina. In a letter you wrote to these states' Attorneys General, you claim that the state laws are "preempted by operation of the NLRA (29 U.S.C. 151, *et seq.*) and the Supremacy Clause of the United States Constitution (U.S. Const. Art IV, cl. 2)."<sup>17</sup>

According to one critic of card check, the NLRB's actions reflect the Board's determination "to accomplish card check by backdoor means against the wishes of the American people and Congress."<sup>18</sup> Late last year, the Democratic majority on the Board "indicated its interest in overturning a Bush-era ruling allowing some workers to challenge a card-check certification agreed to by a company and majority of its workers."<sup>19</sup> Marshall Babson, a management lawyer appointed to a Democratic seat on the NLRB by former President Ronald Reagan, described the NLRB's actions as "a perversion of what administrative law is supposed to be."<sup>20</sup>

The Committee is carefully evaluating labor policy given the current economic climate. The NLRB's recent actions to address labor activity are likely to impact America's economic recovery. They also raise issues of great public importance. In light of these concerns, the Committee seeks information regarding the NLRB's communications and policies. The Committee requests that you provide the following documents and information for the time period from January 1, 2009, to the present:

- 1) All documents and communications referring or relating to the Office of General Counsel's investigation of Boeing, including but not limited to all communications between the Office of General Counsel and the National Labor Relations Board.
- 2) All documents, including emails and call logs, and communications between anyone in the Office of General Counsel or the National Labor Relations Board and the International Association of Machinists.
- 3) All documents, including emails and call logs, and communications between the Office of General Counsel or the National Labor Relations Board and any representative(s) of the Boeing Company.
- 4) All documents referring or relating to the Office of General Counsel's investigations of union election laws in Arizona, South Carolina, South Dakota, and Utah.

---

<sup>16</sup> Sam Hananel, *Feds threaten to sue states over union laws*, AP, (Jan. 14, 2011), available at [http://news.yahoo.com/s/ap/20110114/ap\\_on\\_re\\_us/us\\_unions\\_secret\\_ballots](http://news.yahoo.com/s/ap/20110114/ap_on_re_us/us_unions_secret_ballots) (last visited Mar. 3, 2011).

<sup>17</sup> *Supra* note 14.

<sup>18</sup> Hananel, *supra* note 15, (quoting Phil Kerpen, Vice President for Policy, Americans for Prosperity).

<sup>19</sup> Steven Pearlstein, *Our modern twist on the old world political death spiral*, WASH. POST., (Feb. 27, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022600109.html> (last visited Mar. 1, 2011).

<sup>20</sup> *Id.* (quoting Marshall Babson).

Mr. Lafe E. Solomon  
May 12, 2011  
Page 4

Please provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on May 27, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

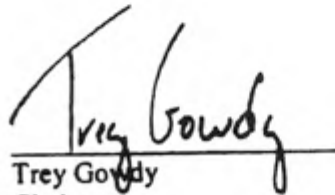
The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

If you have any questions about this request, please contact Kristina Moore or Daniel Epstein of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman  
Committee on Oversight and  
Government Reform



Trey Gowdy  
Chairman  
Subcommittee on Health Care,  
District of Columbia,  
Census and the National Archives



Dennis Ross  
Chairman  
Subcommittee on Federal Workforce,  
U.S. Postal Service and Labor Policy

Enclosure

cc: The Honorable Elijah F. Cummings, Ranking Minority Member

The Honorable Stephen Lynch, Ranking Minority Member,  
Subcommittee on Federal Workforce, U.S. Postal Service & Labor Policy

The Honorable Danny Davis, Ranking Minority Member,  
Subcommittee on Health Care, District of Columbia, Census and the National Archives

ONE HUNDRED TWELFTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

**Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

May 19, 2011

The Honorable John Kline, Chairman  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Phil Roe, Chairman  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

Dear Chairman Kline and Chairman Roe:

I am responding to your letter, dated May 5, 2011, to Acting General Counsel Lafe E. Solomon concerning the complaint issued on April 20, 2011, against The Boeing Company ("Boeing").

The concerns articulated by you appear to be based upon certain statements made by Regional Director Richard Ahearn in response to a reporter's questions about the charge filed against Boeing which had been published by the *Seattle Times* on June 4, 2010. During the course of this interview, Regional Director Ahearn was quoted as saying that there is no "bright line here" and that "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston." He also added that "an initial ruling is weeks away." You appear to construe the statements quoted in this article as an official determination on the merits of this charge. Moreover, because the complaint, which was issued ten months after the interview, alleges that Boeing 'transferred' work from Washington State to South Carolina, you question this 'pivot in position' by NLRB officials and the 'unusual timing' of the issuance of the complaint. Your specific requests for information and our responses are set forth below.

1. A description of what transpired between June 2010 and April 2011 that led the NLRB to alter its opinion in this matter.

As explained more fully below, there are no 'inconsistencies' nor a 'pivot in position' surrounding the April 20, 2011 complaint.

The underlying charge, which was filed on March 26, 2010, by the International Association of Machinists and Aerospace Workers District Lodge No 751 ("Machinists"), was thoroughly investigated by the Seattle Regional Office. At the time when Regional Director Ahearn's comments to a reporter's questions were reported in the *Seattle Times*, the Regional Office was in the midst of the investigation and no decision on the merits had been made. Indeed, following publication of Regional Director Ahearn's remarks, the parties continued to provide their evidence and arguments to the Seattle Regional office as part of that ongoing investigation. On multiple occasions between June 24 and August 25, 2010, the Machinists and Boeing each submitted evidence, documents, and/or statements to the Regional Office in support of their respective positions.

Upon completion of that investigation, on August 31, 2010, Regional Director Ahearn submitted the case to the Division of Advice in Washington, DC, for a determination on the merits of the charge, consistent with the long established practice followed by the NLRB Regional Offices in cases of national significance. The case was then thoroughly reviewed by the Division of Advice.

Recognizing the significance of this matter to both parties, on October 19, 2010, Acting General Counsel Life Solomon took the noteworthy step of inviting Boeing to come to our headquarters office to provide an oral presentation about its position on all issues to him. On December 15, 2010, Boeing made such a presentation. Boeing thereafter submitted additional evidence and position statements to the Acting General Counsel. The Acting General Counsel also invited the Machinists to provide a presentation. They made their oral presentation on January 19, 2011, and thereafter submitted additional support for their position in writing.

Beginning in late January 2011, and continuing through late March 2011, Acting General Counsel Solomon encouraged both parties to negotiate a resolution of this matter. When these attempts failed, Acting General Counsel Solomon decided to issue a complaint based on a careful consideration of the issues and all the evidence and arguments submitted by the parties. Regional Director Ahearn issued the complaint on behalf of the Acting General Counsel on April 20, 2011.

I note that Section 8(a)(3) of the National Labor Relations Act, which is alleged to have been violated in this case, prohibits employers from discriminating against employees in order to encourage or discourage membership in a labor organization. The U.S. Supreme Court has approved the NLRB's *Wright Line* rule in these cases. Pursuant to that rule, the General Counsel has the initial burden of persuading the trial judge by "a preponderance of evidence" that anti-union animus contributed to the employer's adverse action. The employer then has the opportunity to rebut the conclusion that it violated Section 8(a)(3) of the Act by proving, by a preponderance of the evidence, that it would have taken the adverse action even if the employees had not engaged in protected activity. *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983). After the

General Counsel and the employer have both presented evidence, the trial judge must carefully assess and evaluate often conflicting evidence and draw reasonable inferences from the record. *Radio Officers v. NLRB* (A.H. Bell S. S. Co.), 347 U.S. 17 (1954). Thus, consideration of whether an employer violates Section 8(a)(3) requires a careful and balanced assessment of whether protected conduct of employees was a motivating factor in the employer's decision and whether the employer can affirmatively introduce evidence to demonstrate that the challenged action would have taken place regardless of the employees' protected activity.

Regional Director Ahearn's remarks in June 2010 merely reflect an appropriate appreciation of the delicate balancing and careful scrutiny of often conflicting evidence. They reflected his understanding that resolution of cases alleging unlawful discrimination do not turn on disputed legal principles, but on legal inferences to be drawn from an often voluminous factual record. In that regard, he noted that there is no "bright line" in the law that makes it immediately clear whether an action was illegal retaliation or a legitimate strategy when there are myriad facts and evidence to be carefully evaluated, as here. Further, his comments about harm being more readily apparent when a case involves existing, rather than new, work reflects a logical conclusion when comparing that which is tangible from that which may not be as evident. Notably, as indicated by the parties' active participation in the Region's investigation following the report of Regional Director Ahearn's aforementioned remarks, there was no confusion as to his meaning; their participation affirmed the understanding and reality that there had been no determination on the merits of the charge at that time.

As to Regional Director Ahearn's estimate of the timing of an initial determination, that determination was made months after Regional Director Ahearn's estimated time frame because the Acting General Counsel provided additional time to the parties to present their positions and evidence in detail to him personally for a full and fair analysis and to explore an informal resolution of their dispute in the interest of avoiding the need for complaint issuance and subsequent litigation.

2. All documents and communications between the NLRB Region 19 office and the NLRB National office addressing the Boeing complaint.

As you know, Case 19-CA-32431 is an open enforcement action in which the NLRB has alleged that Boeing violated Section 8(a)(3) of the Act. The case is currently set for a hearing before an administrative law judge on June 14, 2011. During that hearing, Boeing will have an opportunity to present evidence and challenge the legal theory of the NLRB. At that hearing, both Boeing and the Machinists will be afforded due process protections and a right to a fair trial. Ultimately, any issues raised by this complaint will be resolved by the Board and the courts after evaluating a comprehensive factual record and the arguments of all parties.

To our knowledge, your request is the first this Agency has ever received from a Committee of the House of Representatives with jurisdiction over the Agency seeking documents within litigation files of an open enforcement action. Our litigation files typically contain affidavit testimony obtained under a promise of confidentiality, as well as the privileged work product of our attorneys and "road maps" of our litigation plans and preparations. The Supreme Court has recognized the importance of protecting the NLRB's assurances of confidentiality. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-41(1978) (upholding NLRB's policy of withholding from FOIA disclosure of witness affidavits in open cases). In addition, premature disclosure of the Acting General Counsel's strategic plans could seriously compromise the litigation and result in an unfair advantage to one litigant over another.

The Agency takes seriously its judicially mandated obligation to protect the due process rights of its litigants. See, e.g., *ATX, Inc. v. U.S. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (in declining to set aside an administrative decision of the Department of Transportation, the court emphasized that the agency took appropriate steps to insulate itself from Congressional intervention).

3. All documents and communications that support the NLRB's position that work is being "transferred" in this case; and
4. Past precedent that supports a finding that Boeing violated Section 8(a)(3) and 8(a)(1) of the NLRA when it decided to locate, not transfer, a second assembly line.

Consistent with our response to your second request, we are not in a position to address the issues to be litigated in the public hearing on the complaint scheduled to begin on June 14 outside the context of that hearing. The information requested here goes to the crux of those issues. The basic facts and legal theory of the Acting General Counsel's cases are contained in the complaint, the related press releases and fact sheet which are attached to this letter and available on the NLRB's public website at <http://www.nlr.gov/node/443>.

In addition, we would be happy to provide the Committee with copies of the transcript and exhibits from the hearing contemporaneous with their availability, as well as copies of the post-hearing briefs to be filed by all parties. The transcript will provide a detailed accounting of the exact nature of the case and the facts proffered in support and rebuttal, which frame the bases for all legal arguments. The briefs will clearly detail the precise precedent invoked and relied upon.

We trust that the information provided above sufficiently addresses your concerns about the investigatory process and timing of the issuance of the complaint against Boeing. If you have further questions, we would be pleased to meet with you to discuss how we might accommodate further information needs that you may have, consistent with our need to protect the integrity of our legal processes. Please do not hesitate to contact Jose Garza,

The Honorable John Kline  
The Honorable Phil Roe  
Page 5 of 5

Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.

Sincerely,



Celeste J. Mattina  
Acting Deputy General Counsel

Attachments

cc: The Honorable George Miller  
Ranking Minority Members  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100

The Honorable Robert E. Andrews  
Democratic Subcommittee Leader  
Subcommittee on Health, Employment,  
Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
2181 Rayburn House Office Building  
Washington, DC 20515-6100



[Home](#) • [News & Media](#) • [News Releases](#)

## National Labor Relations Board issues complaint against Boeing Company for unlawfully transferring work to a non-union facility

April 20, 2011

### Contact:

Office of Public Affairs  
202-273-1991  
[publicinfo@nrlrb.gov](mailto:publicinfo@nrlrb.gov)  
[www.nrlrb.gov](http://www.nrlrb.gov)

NLRB Acting General Counsel Lafe Solomon today issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second production line to a non-union facility in South Carolina for discriminatory reasons.

Boeing announced in 2007 that it planned to assemble seven 787 Dreamliner airplanes per month in the Puget Sound area of Washington state, where its employees have long been represented by the International Association of Machinists and Aerospace Workers. The company later said that it would create a second production line to assemble an additional three planes a month to address a growing backlog of orders. In October 2009, Boeing announced that it would locate that second line at the non-union facility.

In repeated statements to employees and the media, company executives cited the unionized employees' past strike activity and the possibility of strikes occurring sometime in the future as the overriding factors in deciding to locate the second line in the non-union facility.

The NLRB launched an investigation of the transfer of second line work in response to charges filed by the Machinists union and found reasonable cause to believe that Boeing had violated two sections of the National Labor Relations Act because its statements were coercive to employees and its actions were motivated by a desire to retaliate for past strikes and chill future strike activity.

"A worker's right to strike is a fundamental right guaranteed by the National Labor Relations Act," Mr. Solomon said. "We also recognize the rights of employers to make business decisions based on their economic interests, but they must do so within the law. I have worked with the parties to encourage settlement in the hope of avoiding costly litigation, and my door remains open to that possibility."

To remedy the alleged unfair labor practices, the Acting General Counsel seeks an order that would require Boeing to maintain the second production line in Washington state. The complaint does not seek closure of the South Carolina facility, nor does it prohibit Boeing from assembling planes there.

Absent a settlement between the parties, the next step in the process will be a hearing before an NLRB administrative law judge in Seattle, set for June 14, at which both parties will have an opportunity to present evidence and arguments.

[Click here to view a fact sheet.](#)

[Printer-friendly version](#)

### Resources

[The NLRB Process](#)  
[MyNLRB](#)  
[Find a Case](#)  
[File Case Documents](#)  
[Graphs & Data](#)  
[Find Your Regional Office](#)  
[FAQs](#)  
[Forms](#)  
[National Labor Relations Act \(NLRA\)](#)  
[Related Agencies](#)

### Get E-mail Updates

Sign up for updates or to access  
your subscriber preferences

 [SHARE](#)   



[Home](#) • [Boeing Complaint Fact Sheet](#)

## Boeing Complaint Fact Sheet

On April 20, 2011, the Acting General Counsel of the National Labor Relations Board issued a complaint against the Boeing Company alleging that it violated federal labor law by deciding to transfer a second airplane production line from a union facility in the state of Washington to a non-union facility in South Carolina for discriminatory reasons. A hearing has been set for June 14, 2011 in Seattle before an administrative law judge.

[Click here to see a news release about the complaint](#), and [here to see a copy of the full complaint](#).

[Click here to view Boeing's response to the complaint](#).

### The Charge and Complaint

On March 26, 2010, the International Association of Machinists and Aerospace Workers, District Lodge 751, filed a charge with the NLRB alleging that the Boeing Company had engaged in multiple unfair labor practices related to its decision to place a second production line for the 787 Dreamliner airplane in a non-union facility.

Specifically, the union charged that the decision to transfer the line was made to retaliate against union employees for participating in past strikes and to chill future strike activity, which is protected under the National Labor Relations Act.

The union also charged that the company violated the National Labor Relations Act by failing to negotiate over the decision to transfer the production line. The Machinists' union has represented Boeing Company employees in the Puget Sound area of Washington, where the planes are assembled, since 1936, and in Portland, Oregon, where some airplane parts are made, since 1975.

Throughout the investigation of the charge, NLRB officials met with both parties in efforts to facilitate a settlement agreement. The overwhelming majority of NLRB charges found to have merit are settled by agreement. Although no settlement was reached and the Agency was compelled to pursue litigation, the Acting General Counsel remains open to a resolution between the parties.

The complaint issued by the Acting General Counsel ([19-CA-32431](#)) alleges that Boeing violated two sections of the National Labor Relations Act by making coercive statements and threats to employees for engaging in statutorily protected activities, and by deciding to place the second line at a non-union facility, and establish a parts supply program nearby, in retaliation for past strike activity and to chill future strike activity by its union employees.

The investigation found that Boeing officials communicated the unlawful motivation in multiple statements to employees and the media. For example, a senior Boeing official said in a videotaped interview with the Seattle Times newspaper: "The overriding factor (in transferring the line) was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years."

The complaint also alleges that Boeing's actions were "inherently destructive of the rights guaranteed employees by [Section 7 of the Act](#)."

The investigation did not find merit to the union's charge that Boeing failed to bargain in good faith over its decision regarding the second line. Although a decision to locate unit work would typically be a mandatory subject of bargaining, in this case, the union had waived its right to bargain on the issue in its collective bargaining agreement with Boeing.

### The Law and Supporting Cases

The NLRB enforces the National Labor Relations Act, which guarantees employees the right to organize and collectively bargain, or to refrain from doing so. Applicable Sections of the Act follow:

#### RIGHTS OF EMPLOYEES

**Section 7:** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities...

### In this Section

[Home](#)  
[Rights We Protect](#)  
[What We Do](#)  
[Cases & Decisions](#)  
[Who We Are](#)  
[News & Media](#)  
[Publications](#)

### Resources

[The NLRB Process](#)  
[MyNLRB](#)  
[Find a Case](#)  
[File Case Documents](#)  
[Graphs & Data](#)  
[Find Your Regional Office](#)  
[FAQs](#)  
[Forms](#)  
[National Labor Relations Act \(NLRA\)](#)  
[Related Agencies](#)

[Get E-mail Updates](#)  
 Sign up for updates or to access  
 your subscriber preferences

[SHARE](#) 

**RIGHT TO STRIKE**

Section 13: Nothing in this Act ... shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

**UNFAIR LABOR PRACTICES (relevant sections)**

Section 8(a) It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

**Cases:**

On the 8(a)(1) charge:

The U.S. Supreme Court delineated the line between protected employer speech versus unlawful employer speech under the NLRA in NLRB v. Gissel Packing Corp., 395 US 575, 618 (1969).

In General Electric Company, 215 NLRB 520 (1974), the National Labor Relations Board applied the Gissel test to set aside an election because the employer, citing concerns about possible future strikes, stated that the plant's nonunion status was a primary factor in choosing to locate a production line for a new motor there. In its decision, the Board distinguished an employer's right to take defensive action when threatened with an imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date."

Since then, the Board has repeatedly held that an employer violates section 8(a)(1) by threatening that employees will lose their jobs if they join a strike, or by predicting a loss of business and jobs because of unionization or strike disruptions without any factual basis. In contrast, the Board has found that employers may lawfully relate concerns raised by customers (Curwood, Inc., 339 NLRB 1137 (2003)). They may also reference the possibility that unionization, including strikes, might harm relationships with consumers, as opposed to predicting "unavoidable consequences." Miller Industries Towing Equipment, Inc., 342 NLRB 1074, 1075-76 (2004)

On the 8(a)(3) charge:

An employer's discouragement of its employees' participation in a legitimate strike constitutes discouragement of union membership within the meaning of this section. This applies to employer conduct designed to retaliate against employees for having engaged in a strike in the past (Capehorn Industry, 336 NLRB 364 (2001) where the employer failed to reinstate strikers when there was no legitimate business justification for permanently subcontracting the work), as well as employer conduct designed to forestall employees from exercising their right to strike in the future (Century Air Freight, 284 NLRB 730 (1987) where employer permanently subcontracted unit work and discharged employees in order to forestall the exercise of their right to strike; and Westpac Electric, 321 NLRB 1322 (1996), where employer isolated employee in retaliation for previous and anticipated future strike activities). In National Fabricators 295 NLRB 1095 (1989), where potential strikers were targeted for layoffs, the Board held that "disfavoring employees who were likely to strike, is the kind of coercive discrimination that...discourages...protected activity."

**Next Steps**

It is important to note that the complaint states allegations by the Acting General Counsel that the employer has committed unfair labor practices. The Board has made no findings on these allegations. The next step in the process will be a hearing before an NLRB administrative law judge, scheduled for June 14 at the NLRB's Seattle office. At the hearing, both parties will have an opportunity to present evidence and argue in favor of their position. The decision of the judge may be appealed to the Board in Washington by the filing of exceptions by either party. The Board's decision could further be appealed to a federal court of appeals and then to the U. S. Supreme Court. [Click here for a flow chart of the NLRB process.](#)

This fact sheet was posted on 4/20/2011 and will be updated periodically.

[Printer-friendly version](#)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

THE BOEING COMPANY

and

Case 19-CA-32431

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS  
DISTRICT LODGE 751, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS

**COMPLAINT AND NOTICE OF HEARING**

International Association of Machinists and Aerospace Workers District Lodge No. 751 ("Local 751" or the "Union"), affiliated with International Association of Machinists and Aerospace Workers ("IAM"), has charged in Case 19-CA-32431 that The Boeing Company ("Respondent" or "Boeing"), has been engaging in unfair labor practices as set forth in the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*

Based thereon, the Acting General Counsel of the National Labor Relations Board (the "Board"), by the undersigned, pursuant to § 10(b) of the Act and § 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by the Union on March 26, 2010, and was served on Respondent by regular mail on or about March 29, 2010.

2.

(a) Respondent, a State of Delaware corporation with its headquarters in Chicago, Illinois, manufactures and produces military and commercial aircraft at various facilities throughout the United States, including in Everett, Washington (the "facility"), and others in the Seattle, Washington, and Portland, Oregon, metropolitan areas.

(b) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) Respondent, during the past twelve months, which period is representative of all material times, in conducting its business operations described above in paragraph 2(a), both sold and shipped from, and purchased and received at, the facility goods valued in excess of \$50,000 directly to and from points outside the State of Washington.

(d) Respondent has been at all material times an employer engaged in commerce within the meaning of §§ 2(2), (6) and (7) of the Act.

3.

The Union is, and has been at all material times, a labor organization within the meaning of § 2(5) of the Act.

4.

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of

§ 2(11) of the Act, and/or agents within the meaning of § 2(13) of the Act, acting on behalf of Respondent:

|               |   |                                                                                                                                                                       |
|---------------|---|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Jim Albaugh   | — | Executive Vice President, Boeing; President and CEO of Integrated Defense Systems (until late August 2009); CEO, Boeing Commercial Airplanes (as of late August 2009) |
| Scott Carson  | — | Executive Vice President, Boeing; CEO, Boeing Commercial Airplanes (until late August 2009)                                                                           |
| Ray Conner    | — | Vice President and General Manager of Supply Chain Management and Operations, Boeing Commercial Airplanes                                                             |
| Scott Fancher | — | Vice President and General Manager of the 787 Program                                                                                                                 |
| Fred Kiga     | — | Vice President, Government and Community Relations                                                                                                                    |
| Doug Kight    | — | Vice President, Human Resources, Boeing Commercial Airplanes                                                                                                          |
| Jim McNemey   | — | President, Chairman, and CEO                                                                                                                                          |
| Jim Proulx    | — | Boeing spokesman                                                                                                                                                      |
| Pat Shanahan  | — | Vice President and General Manager of Airplane Programs                                                                                                               |
| Gene Woloshyn | — | Vice President, Employee Relations                                                                                                                                    |

5.

(a) Those employees of Respondent enumerated in Section 1.1(a) of the collective bargaining agreement described below in paragraph 5(c), including, *inter alia*, all production and maintenance employees in Washington State, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Puget Sound Unit").

(b) Those employees of Respondent enumerated in Section 1.1(c) of the collective bargaining agreement described below in paragraph 5(c), including, *inter*

*alia*, all production and maintenance employees in the Portland, Oregon area, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act (the "Portland Unit").

(c) Since at least 1975 and at all material times, the IAM has been the designated exclusive collective bargaining representative of the Puget Sound Unit and the Portland Unit (collectively, the "Unit") and recognized as such representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 2, 2008, to September 8, 2012.

(d) Since 1975, during the course of the parties' collective-bargaining relationship, the IAM engaged in strikes in 1977, 1989, 1995, 2005, and 2008.

6.

On or about the dates and by the manner noted below, Respondent made coercive statements to its employees that it would remove or had removed work from the Unit because employees had struck and Respondent threatened or impliedly threatened that the Unit would lose additional work in the event of future strikes:

(a) October 21, 2009, by McNerney in a quarterly earnings conference call that was posted on Boeing's intranet website for all employees and reported in the Seattle Post Intelligencer Aerospace News and quoted in the Seattle Times, made an extended statement regarding "diversifying [Respondent's] labor pool and labor relationship," and moving the 787 Dreamliner work to South Carolina due to "strikes happening every three to four years in Puget Sound."



(b) October 28, 2009, based on its October 28, 2009, memorandum entitled "787 Second Line, Questions and Answers for Managers," informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce Respondent's vulnerability to delivery disruptions caused by work stoppages.

(c) December 7, 2009, by Conner and Proulx in an article appearing in the Seattle Times, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(d) December 8, 2009, by Conner in an article appearing in the Puget Sound Business Journal, attributed Respondent's 787 Dreamliner production decision to use a "dual-sourcing" system and to contract with separate suppliers for the South Carolina line to past Unit strikes.

(e) March 2, 2010, by Albaugh in a video-taped interview with a Seattle Times reporter, stated that Respondent decided to locate its 787 Dreamliner second line in South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.

7.

(a) In or about October 2009, on a date better known to Respondent, but no later than October 28, 2009, Respondent decided to transfer its second 787 Dreamliner production line of 3 planes per month from the Unit to its non-union site in North Charleston, South Carolina.

(b) Respondent engaged in the conduct described above in paragraph 7(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 7(a), combined with the conduct described above in paragraph 6, is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

8.

(a) In or about October 2009, on a date better known to Respondent, but no later than December 3, 2009, Respondent decided to transfer a sourcing supply program for its 787 Dreamliner production line from the Unit to its non-union facility in North Charleston, South Carolina, or to subcontractors.

(b) Respondent engaged in the conduct described above in paragraph 8(a) because the Unit employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes and to discourage these and/or other employees from engaging in these or other union and/or protected, concerted activities.

(c) Respondent's conduct described above in paragraph 8(a), combined with the conduct described above in paragraphs 6 and 7(a), is also inherently destructive of the rights guaranteed employees by § 7 of the Act.

9.

By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in § 7 of the Act in violation of § 8(a)(1) of the Act.

10.

By the conduct described above in paragraphs 7 and 8, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of §§ 8(a)(3) and (1) of the Act.

11.

By the conduct described above in paragraphs 6 through 10, Respondent has engaged in unfair labor practices affecting commerce within the meaning of §§ 2(6) and (7) of the Act.

12.

As part of the remedy for the unfair labor practices alleged herein, the Acting General Counsel seeks an Order requiring either that one of the high level officials of Respondent alleged to have committed the violations enumerated above in paragraph 6 read, or that a designated Board agent read in the presence of a high level Boeing official, any notice that issues in this matter, and requiring Respondent to broadcast such reading on Respondent's intranet to all employees.

13.

(a) As part of the remedy for the unfair labor practices alleged above in paragraphs 7 and 8, the Acting General Counsel seeks an Order requiring Respondent

to have the Unit operate its second line of 787 Dreamliner aircraft assembly production in the State of Washington, utilizing supply lines maintained by the Unit in the Seattle, Washington, and Portland, Oregon, area facilities.

(b) Other than as set forth in paragraph 13(a) above, the relief requested by the Acting General Counsel does not seek to prohibit Respondent from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility.

#### **ANSWER REQUIREMENT**

Respondent is notified that, pursuant to §§ 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to this Complaint. The answer must be **received by this office on or before May 4, 2011, or postmarked on or before May 3, 2011.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at **www.nlr.gov**, click on ***File Case Documents***, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due

date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See § 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

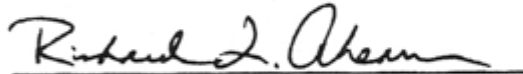
Service of the answer on each of the other parties must be accomplished in conformance with the requirements of § 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in this Complaint are true.

#### **NOTICE OF HEARING**

PLEASE TAKE NOTICE THAT on the 14<sup>th</sup> day of June, 2011, at 9:00 a.m., in James C. Sand Hearing Room, 2966 Jackson Federal Building, 915 Second Avenue, Seattle, Washington, and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in

this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

**DATED** at Seattle, Washington, this 20<sup>th</sup> day of April, 2011.

A handwritten signature in cursive script, reading "Richard L. Ahearn", written in dark ink.

Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174-1078





COMMITTEE ON EDUCATION  
AND THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES  
2181 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6100

2011 MAY 12 AM 11:35

May 5, 2011

Lafe E. Solomon  
Acting General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

Dear Acting General Counsel Solomon:

The National Labor Relations Board's (NLRB) recent action against The Boeing Company is deeply troubling. Although the facts of the case are still in dispute, its eventual outcome could have significant consequences for job-creators and workers. In light of the potential impact on the nation's workforce, apparent inconsistencies surrounding the NLRB's April 20, 2011 complaint merit further explanation.

As you are aware, on March 26, 2010, the International Association of Machinists and Aerospace Workers District Lodge No. 751 filed a charge with the NLRB claiming Boeing violated sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act (NLRA). Central to the charge is Boeing's decision to locate a second 787 Dreamliner assembly line in Charleston, South Carolina. The complaint references alleged statements made by Boeing officials between October 2009 and March 2010 that work stoppages were one reason for choosing the new location.

When asked about the charge in June 2010, the NLRB regional director Richard Ahearn told *The Seattle Times* "it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston."<sup>1</sup> He was also unable to point to any "bright line" rule to determine whether the company's actions violated the law.<sup>2</sup> Finally, the regional director stated "an initial ruling is weeks away."<sup>3</sup>

More than 10 months later on April 20, 2011, Mr. Ahearn issued a complaint. In contrast to previous statements, he now alleges Boeing "transferred" work from Washington.<sup>4</sup> According to the regional

<sup>1</sup> Gates, Dominic, *Machinists file unfair labor charge against Boeing over Charleston*, *The Seattle Times*, June 4, 2010. Available at [http://seattletimes.nwsource.com/html/business/technology/2012034258\\_boeing05.html](http://seattletimes.nwsource.com/html/business/technology/2012034258_boeing05.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Complaint and Notice of Hearing: The Boeing Company and International Association of Machinists and Aerospace Workers District Lodge 751*, Case 19-CA-32431, Page 5.

director, the transfer of the assembly line in conjunction with alleged comments made by company officials violates the NLRA.<sup>5</sup>

While we understand that no union employee at the Puget Sound facility has lost his or her job or been financially harmed by what appears to be a legitimate business decision, the NLRB is seeking an extraordinary remedy that requires Boeing to relocate its operations across the country.<sup>6</sup> This would have a detrimental impact on the economy and workers of South Carolina, as well as have a chilling effect upon businesses across the country.

The pivot in position by NLRB officials, as well as the unusual timing, raises serious concerns that warrant congressional inquiry. To better understand the appropriateness and evolution of this complaint, provide the following no later than May 19, 2011:

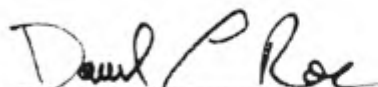
1. A description of what transpired between June 2010 and April 2011 that led the NLRB to alter its opinion in this matter;
2. All documents and communications between the NLRB Region 19 office and the NLRB National office addressing the Boeing complaint;
3. All documents and communications that support the NLRB's position that work is being "transferred" in this case; and
4. Past precedent that supports a finding that Boeing violated sections 8(a)(3) and 8(a)(1) of the NLRA when it decided to locate, not transfer, a second assembly line.

Thank you for your cooperation in this matter. If you have any questions regarding this request, please contact Marvin Kaplan of the Committee staff at (202) 225-7101.

Sincerely,



John Kline  
Chairman  
Education and the Workforce Committee



Phil Roe, M.D.  
Chairman  
Subcommittee on Health, Employment, Labor  
and Pensions

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee

cc: The Honorable Robert Andrews, Senior Democratic Member, Subcommittee on Health, Employment, Labor, and Pensions

---

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7-8.

### **Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i. e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents should be delivered, one set to the Majority Staff in Room 2181 of the Rayburn House Office Building and one set to the Minority Staff in Room 2101 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.





United States Government  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlrb.gov](http://www.nlrb.gov)

February 25, 2011

The Honorable Phil Roe  
Chairman, Subcommittee on Health,  
Employment, Labor and Pensions  
Committee on Education and the Workforce  
House of Representatives  
Washington, DC 20515

Dear Chairman Roe:

I have served as Acting General Counsel of the National Labor Relations Board since June 21, 2010. President Obama has also nominated me to serve a four-year term as General Counsel. I have spent my entire career with the Agency, beginning as a field examiner in 1972, and have worked for nine different Members of the Board. Prior to being appointed Acting General Counsel, I was the Director of the Office of Representation Appeals.

I appreciate this opportunity to supplement the record of the Subcommittee's February 11, 2011 hearing on "Emerging Trends at the National Labor Relations Board." The NLRB General Counsel is responsible for directing and managing the casehandling operations of the Agency. Among the matters addressed by the witnesses at the hearing were four initiatives that I have undertaken as Acting General Counsel of the Board. I have attached each of the initiatives to this letter and I ask that they be made part of the hearing record. I hope the following explanation of the genesis and rationale for each of the initiatives will be helpful to the Subcommittee as it evaluates the work of the Agency. These initiatives follow the tradition of administrative strategies undertaken by past General Counsels to more effectively enforce the National Labor Relations Act.

#### **Deferral to Arbitral Awards and Grievance Settlements (GC Memorandum 11-05)**

This initiative was begun by my predecessor, General Counsel Ronald Meisburg. See, OM Memorandum 10-13 (CH), "Casehandling Regarding Application of *Spielberg/Olin* Standards" (November 3, 2009). That Memorandum recognized that caselaw in Court of Appeals for the D.C. Circuit and the Supreme Court compelled a reexamination of the Board's standards for deciding whether to defer to an arbitral award as the resolution of an unfair labor practice charge. GC Memorandum 11-05 represents the fruits of our year long analysis of the issue.



When conduct alleged as an unfair labor practice is also the subject of a grievance alleging that the conduct violated a collective-bargaining agreement, the Board has two concerns: on the one hand, to carry out its statutory mandate to prevent unfair labor practices by investigating and deciding the charge and, on the other hand, to foster the statutory policy in favor of private resolution of disputes through the collective bargaining process. Initially, under its *Collyer/Dubo* deferral policy, the Board effectively implements both policies by suspending processing of the unfair labor practice charge, once it determines that the charge has "arguable merit," and awaiting the outcome of the grievance proceeding. Typically, the grievance-arbitration resolution is satisfactory to all parties and thus resolves the unfair labor practice charge as well. GC Memorandum 11-05 does not disturb this widely accepted practice.

Occasionally, however, grievants claim that although the grievance-arbitration process resolved the contract claim, it did not properly resolve their claim of a violation of their individual statutory right to be free of discrimination and other interference with protected activity. In that minority of cases, the Board's mandate to decide unfair labor practice allegations may be in conflict with its policy to foster collective bargaining. The Board's *Spielberg/Olin* line of cases attempts to reconcile these policies and articulate a test for deciding when to defer to an arbitral award or grievance settlement as the resolution of the unfair labor practice charge. In essence, the Board accepts the arbitral resolution of the NLRA claim if (1) the contractual and statutory issues were "factually parallel," (2) the facts relevant to the statutory claim were "presented generally" to the arbitrator, and (3) the arbitrator's award or the grievance settlement is not "clearly repugnant" to the Act or "palpably wrong", that is, it is susceptible to an interpretation consistent with the Act. By its terms, this standard permits deferral even in circumstances where the statutory issue was not considered by the arbitrator.

This test has been subjected to significant criticism. Specifically, since 1986, the D.C. Circuit has challenged the Board to articulate a convincing theory animating its decisions in this area. In frustration with the Board's adherence to the *Spielberg/Olin* test, that court has more recently adopted its own "contractual waiver" theory, under which it has refused to enforce the Board's decisions. Because any party to a Board proceeding may seek review of the Board's decision in the D.C. Circuit, both my predecessor, Mr. Meisburg, and I thought it essential to craft a response to that court's criticisms.

Another source of guidance has been Supreme Court decisions regarding the circumstances under which employees will be deemed to have waived a federal court forum for resolution of their individual statutory right claims, in favor of arbitration of those claims. The Court has made clear that for a collective bargaining agreement's purported waiver of access to the judicial forum to be enforceable, the agreement must give the arbitrator the authority to decide the statutory issue and the arbitrator must in fact do so. See, *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456, 1469-1471 (2009).

These decisions do not directly control the Board's deferral policy – that policy is an exercise of the Board's discretion; §10(a) of the Act expressly preserves the Board's authority to decide unfair labor practice cases "[un]affected by any other means of adjustment." Nevertheless, they are instructive as to the prevailing view of the appropriate place of arbitration in the resolution of statutory employment claims.

Based on all of these considerations, I concluded that the Board should apply a more stringent standard for determining which arbitral awards and grievance settlements are appropriate resolutions of an unfair labor practice claim. Accordingly, I will urge the Board to change the *Spielberg/Olin* standard and to defer only if the arbitrator or parties to the grievance settlement had the authority to, and did, consider the statutory claim. The position we will advocate does not alter the "clearly repugnant" test of *Spielberg/Olin* for rejecting arbitral awards and grievance settlements that have considered the statutory issue. Nor would it affect questions of deferral in unfair labor practice cases that turn on the interpretation of a collective-bargaining agreement.

I anticipate that this change will have no adverse impact on the Agency's workload or ability to handle the entire range of cases before it. Indeed, from 2001 to date, our deferred case inventory has declined substantially, and I expect the change to affect only a small percentage of these cases.

**Casehandling Procedures regarding Violations during Organizing Campaigns:  
Effective §10(j) Remedies for Unlawful Discharges in Organizing Campaigns (GC  
Memorandum 10-07); Effective Remedies in Organizing Campaigns (GC  
Memorandum 11-01)**

Employees' right to engage in organizing activity among themselves and to decide whether to be represented is at the core of rights protected by the Act. The directives embodied in GC Memoranda 10-07 and 11-01 are designed to insure that the Agency protects this right by providing swift and effective remedies for violations calculated to "nip-in-the-bud" employees' organizing activities before they can bear fruit. As the cases described in GC 11-01 demonstrate, this initiative is aimed only at serious violations: discharge and other retaliation against employee activists, threats of discharge, closure and other adverse consequences if employees support unionization, interrogation and surveillance of union activities, as well as the solicitation of grievances and promise or grant of benefits.

Two consequences of such violations are well-recognized. First, they affect not only the individual victim of the violation but the entire workforce. When activist employees are discharged, the remaining employees are deprived of their leadership. In addition, these violations send a message to all employees that they too risk retaliation by supporting the organizing effort. Second, time is of the essence in countering these effects. With the passage of time, discharged employees become unavailable for reinstatement and support for the organizing campaign dissolves so that an ultimate Board order is ineffective to restore the status quo or safeguard the employees' rights.

My initiatives are designed to counter these serious consequences by assuring that discharges are promptly remedied and by including in the relief sought remedies that ameliorate the impact of the violations.

Neither of these memoranda represents a sharp departure from prior Agency practice. Past General Counsels have used the §10(j) program as an essential strategy for effectively enforcing the Act. Moreover, as the attached chart shows, my initiatives embody a targeted approach, not a blunderbuss. Between October 1, 2010, when the §10(j) initiative under GC 10-07 began, and January 31, 2011, Regional Offices submitted 28 nip-in-the-bud cases to the Injunction Litigation Branch in headquarters. This represents a tiny fraction of the more than 7000 charges filed in that time frame. At the same time, we were able to promptly decide the need for interim relief and obtain suitable remedies where warranted: By January 31, we had decided that §10(j) was not warranted in nine cases, obtained a district court order in one case, and settled 12 cases.

Similarly, the initiative regarding effective remedies in nip-in-the-bud cases stems from traditional remedial law. The touchstone for determining the appropriate remedy in any case is to determine what relief is necessary to restore the conditions that existed before the violations occurred. GC 11-01 is premised on the principle, discussed above, that the impact of nip-in-the-bud violations is not confined to the individual victim of the violation but resounds among all employees.

Thus, to restore the conditions that existed before the violations occurred requires more than making whole the individual victim with backpay and reinstatement. The remedy must include action to erase the adverse impact of the violations among all employees. GC 11-01 recognizes that the Board's traditional notice posting is inadequate in this respect in serious nip-in-the-bud violations. The Memorandum directs Regional Offices to evaluate the impact of the violations in each case and provides the legal analysis for determining the specific circumstances that warrant a reading remedy or – in cases involving disruption to employee/union communications – access to company bulletin boards or to employee names and addresses. Moreover, Regions are not authorized to seek more significant access remedies without authorization on a case-by-case basis by the Division of Advice in headquarters.

Contrary to the contentions of some witnesses, these initiatives do not expend additional Agency resources. The best practices for §10(j) caseprocessing outlined in GC 10-07 streamline the §10(j) authorization process and eliminate duplicative written work. The remedial investigation into the impact of nip-in-the-bud violations required by GC 11-01 is the same investigation that Board agents have been conducting for the past 15 years as part of their analysis of the need for §10(j) relief in all nip-in-the-bud cases. In sum, these remedies are carefully targeted to rectify the impact that "nip-in-the-bud" violations have on fundamental employee rights. Their use remains exceedingly rare when you consider how many charges are brought to the Agency's attention.

**Use of Default Language in Informal Settlement Agreements (GC Memorandum 11-04)**

This initiative is an effort to obtain more effective means of restraining recidivist violators of the Act without unnecessary expenditure of resources by the Agency. The Agency has an active settlement program that resolves complaints before litigation in over 90% of meritorious cases. The most common kind of settlement is the "informal settlement" in which the respondent agrees to explicit undertakings to remedy the violations alleged. Absent default language in such a settlement, the Agency's only recourse in the event of breach is to revoke the settlement and reinstitute litigation. The default provision provides that if the respondent breaches the settlement agreement, it will be deemed to have admitted the allegations and it consents to entry of a Board order and enforcing court judgment. It imposes no additional burden on a respondent that fulfills its obligations under the settlement. Last year, my predecessor began discussions about a similar default language proposal with the ABA's Committee on Practice and Procedure before the NLRB; likewise I consulted with that Committee before I implemented this initiative.

Contrary to the testimony of some witnesses, there is no reason to believe that this initiative will discourage settlement or lead to additional litigation. As the Memorandum explains, use of default language has been a longstanding practice in five Regional Offices and their settlement and litigation success rates are consistent with national standards.

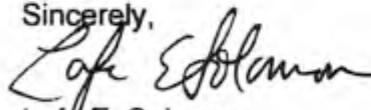
**Allegations of Misconduct in Indiana Case**

Finally, I wish to respond to concerns raised during the hearing by Representative Rokita of Indiana. A constituent of Mr. Rokita had alleged misconduct by a NLRB Board agent. After the hearing, my office contacted the NLRB Regional Director for Region 25 in Indianapolis, who specifically inquired of his entire staff about the allegations. No one was familiar with any such incident. I have asked Mr. Rokita for further information about his constituent's claims and will certainly follow up when I receive that information.

Further, I have consistently stated in my public speaking engagements, in addition to my meetings with the Agency's Regional Directors, that I encourage any member of the public to bring to my attention any complaint or concern about his/her dealings with any Regional personnel, and I will personally review the matter.

Again, I appreciate the opportunity to supplement the record of the hearing and I hope that this letter will be helpful to the Subcommittee as it continues its important work.

Sincerely,



Laff E. Solomon  
Acting General Counsel

Enclosures



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11- 05

January 20, 2011

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Deferral to Arbitral  
Awards and Grievance Settlements in Section 8(a)(1)  
and (3) cases

I. Introduction

In Memorandum OM 10-13 (CH) "Casehandling Regarding Application of Spielberg/Olin standards," issued under former General Counsel Meisburg on November 3, 2009, we recognized that "a new approach to cases involving arbitral deference may be warranted," particularly given certain recent opinions of the Supreme Court and the Court of Appeals for the D.C. Circuit. Regions were instructed to submit post-arbitral deferral cases to the Division of Advice to provide the basis for a case-by-case review in order to develop that new approach. Based on our consideration of these cases and the underlying legal issues, we will urge the Board to modify its approach in post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases, and to apply a new framework in all such cases requiring post-arbitral review. This memorandum explains that framework and the reasons for adopting it as well as guidance on handling cases that implicate these issues.

II. The Statutory Scheme of the NLRA Requires a Balance between Protecting Individual Rights and Encouraging Private Dispute Resolution within Collective Bargaining

Congress charged the National Labor Relations Board with the responsibility of protecting the Section 7 right of employees to engage in concerted activity for mutual aid and protection. Sections 8(a)(1) and (3) of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and further provides that the Board's powers "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or

otherwise . . ."<sup>1</sup> (Emphasis added.) Thus, the Board has a statutory mandate under Section 10(a) to protect individual rights and protect employees from being discharged or otherwise discriminated against in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution arrangement.

At the same time, Section 1 of the NLRA and Section 203(d) of the Labor Management Relations Act favor collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative. Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added). Thus, there is a potential conflict, or at least a tension, between the statutory policies protecting individual rights and the Board's enforcement of the Act, and the policy encouraging collectively-bargained dispute resolution.

To reconcile the different emphases of these statutory policies, "the Board has considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act" to foster collective bargaining.<sup>2</sup> As is evident from the language in Section 10(a) itself, however, the Board is not required to stay its hand just because an employer and a union representing its employees have resolved a dispute through an agreed-upon grievance arbitration process.<sup>3</sup>

<sup>1</sup> As the D.C. Circuit has recognized, Section 10(a) "is intended to make it clear that although other agencies may be established by code, agreement, or law to handle labor disputes, such other agencies can never divest the National Labor Relations Board of jurisdiction which it would otherwise have." Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc) (quoting Staff of Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) at 3 (Comm. Print 1935) (emphasis supplied by the court)).

<sup>2</sup> International Harvester Co., 138 NLRB 923, 926 (1962), affd. sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).

<sup>3</sup> Spielberg Mfg. Co., 112 NLRB 1080, 1081-1082 (1955), citing NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944), cert. denied 324 U.S. 877 (1945).



III. Supreme Court Precedent in Non-NLRA Individual Rights Cases Allows Private Parties to Waive Access to a Statutory Forum in Favor of Arbitration Only if the Arbitrator Decides the Statutory Issue

An important source of guidance for striking an appropriate balance between the protection of employees' statutory rights and giving effect to arbitration awards is how the Supreme Court envisions the role of arbitrators deciding statutory rights in cases where federal courts have jurisdiction to decide those statutory rights. In the context of Title VII and other individual rights cases, the Court allows parties to waive their use of the statutorily-established forum, i.e., the courts, where such waivers are consistent with applicable law, but has required that an arbitrator must resolve the rights at issue consistent with the applicable statutory principles. Thus, in *Gilmer*,<sup>4</sup> the Court held that employees can waive the judicial forum for resolving a substantive right, i.e., a right guaranteed under a statute, but they cannot prospectively waive the substantive right itself. In *Pyett*,<sup>5</sup> the Court held that a union, as well, can waive employees' rights to a particular forum, as long as the waiver is expressed in clear and unmistakable terms, but the Court emphasized that such a waiver is enforceable only if the collective-bargaining agreement gives the arbitrator the authority to decide the statutory issue.

Thus, the Court made it clear that, for an arbitration agreement's waiver of access to a statutory forum to be enforceable, the collective-bargaining agreement must give an arbitrator the authority to decide the statutory issue, and the arbitrator must in fact do so.<sup>6</sup> The Court further highlighted this requirement by noting that judicial review of arbitration awards, while limited, enables courts to "ensure that arbitrators comply with the requirements of the statute." Thus, the Court clarified that it would cede jurisdiction to arbitrators only if the arbitrator is authorized to decide the statutory issue, and does so consistent with applicable statutory principles.

<sup>4</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

<sup>5</sup> *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456, 1469-1471 (2009).

<sup>6</sup> *Pyett*, 129 S.Ct. at 1469-1471.

<sup>7</sup> *Id.*, 129 S.Ct. at 1471 fn. 10, citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987).

To be sure, the Pyett/Gilmer line of cases is merely instructive to the Board as an indication of the Supreme Court's view of the role of arbitration in resolving statutory rights -- it does not directly control the parameters of the Board's deferral policy. For, as discussed above, the Board's policy is an exercise of discretion in choosing to stay its hand, rather than being ousted of jurisdiction as are the courts -- the NLRA expressly provides in Section 10(a) that the Board does not lose jurisdiction even if private parties agree that it should.<sup>8</sup> Nevertheless, we believe the principles articulated by the Court have applicability under the NLRA statutory scheme.

IV. Olin's Standards for Deferral Do Not Adequately Protect Employees' Statutory Rights; Therefore, We Will Urge the Board to Change its Framework for Post-Arbitral Deferral

Viewed against this backdrop, the Board's current post-arbitral deferral policy is distinctly at odds with that which prevails in other areas of employment law. The Court clearly envisions that employees will receive full consideration of their statutory rights in arbitration; both Pyett and Gilmer emphasize that no waiver of statutory rights is entailed in having those rights considered by an arbitrator. The only difference at issue is whether an arbitrator or a judge applies the statute.<sup>9</sup>

Although, as discussed above, the Board's deferral policy is one of discretion rather than an ouster of jurisdiction, this difference only heightens the Board's obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award, rather than providing an even lower standard of protection of statutory rights, as does the current deferral framework. As the Board has recently reiterated in a different context, "[a]s an administrative agency establishing rules to govern a particular field of law (within the limits of the statute it administers), the

---

<sup>8</sup> See also, e.g., Bill's Electric, Inc., 350 NLRB 292, 296 (2007) (mandatory arbitration policy violated the Act, as it would reasonably be read as substantially restricting, if not totally prohibiting, employees' access to the Board's processes); U-Haul Co. of California, 347 NLRB 375, 377-378 and fn. 11 (2006), enfd. mem. 255 F. Appx 527 (D.C. Cir. 2007) (same).

<sup>9</sup> Pyett, 129 S.Ct. at 1469; Gilmer, 500 U.S. at 26.

Board has a different role than the courts, operating 'on a wider and fuller scale' that 'differentiates . . . the administrative from the judicial process.'<sup>10</sup> The Board's "wider and fuller" role should cause the Board to more zealously guard its mandate to protect statutory rights, in contrast to the courts, whose jurisdiction over statutory claims is more limited.

In contrast to the Court's vision of ensuring the actual arbitral consideration of the rights afforded by Title VII and other employment statutes, the Board's Olin<sup>11</sup> standards for accepting an arbitral award as the resolution of NLRA rights -- that the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice" -- do not require such consideration. In addition, the Board's Olin standards tolerate substantive outcomes from arbitrators that differ significantly from those that the Board itself would reach if it considered the matter de novo. Such outcomes can result in the denial of substantive Section 7 rights -- if the overly deferential Olin standards are met, the Board may dismiss the administrative charge even if the statutory issue has never been considered.

Viewed solely under NLRA principles, this result has long struck some courts as at least in need of further explanation and justification by the Board.<sup>12</sup> Some have found an actual abdication of the Board's statutory responsibilities.<sup>13</sup> In the intervening years, the

<sup>10</sup> Kentucky River Medical Center, 356 NLRB No. 8, slip op. at 2-3 (2010), citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349-350 (1953).

<sup>11</sup> Olin Corp., 268 NLRB 573, 573-574 (1984).

<sup>12</sup> See Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986).

<sup>13</sup> See Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986) ("By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, Olin Corp. gives away too much of the Board's responsibility under the NLRA."). See also Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference); Stephenson v. NLRB, 550 F.2d 535, 538 and n. 4 (9th Cir. 1977) ("Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue . . . The "clearly decided" requisite is designed to enable

development of more demanding standards for the arbitration of statutory employment rights, spurred by Gilmer, has only served to heighten the need for the Board to provide a more convincing explanation to the courts and to the public for its apparent lesser valuation of NLRA rights than is the norm for statutory employment rights. This need for further explanation and justification is accentuated where Olin deferral is granted even though the collectively-bargained grievance arbitration procedures do not expressly authorize the arbitrator to resolve statutory NLRA claims or require that the arbitrator apply statutory principles, as is often the case.

We note that these considerations only apply to cases alleging violations of employee rights arising under Section 8(a)(1) and 8(a)(3) of the Act, not to cases solely alleging violations of Section 8(a)(5). In bargaining cases, as the Board has recognized, the "[r]esolution of the ultimate issue . . . [does] not rest solely on interpretation of the statute, but turn[s] on contract interpretation."<sup>14</sup> In such cases, given the close identity of the statutory rights and contract interpretation issues, the current deferential Olin standards adequately safeguard the statutory enforcement scheme.

Accordingly, we have decided to urge the Board to adopt a new approach. Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.

Further, we will urge the Board to change Olin's allocation of the burden of proof for deferral. We believe that the party urging deferral should have the burden of showing that the deferral standards articulated above have been met. This will ensure that the statutory issues have indeed been considered by the arbitrator, as well as encourage parties seeking deferral to establish an evidentiary record that will give the Board a sounder basis for reviewing arbitral awards and deciding whether to defer. Thus, the

---

the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act").

<sup>14</sup> Mt. Sinai Hospital, 331 NLRB 895, 898 (2000), enfd. mem. 8 Fed. Appx. 111 (2d Cir. 2001).



party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's decision or award is not susceptible to an interpretation consistent with the Act. Such a framework would provide greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining.<sup>15</sup>

This is not a novel approach. Prior to Olin, the Board, with widespread contemporary court approval, required consideration of the statutory issue as a condition for deferral and placed the burden of persuasion on the party seeking deferral.<sup>16</sup> Thus, as early as 1963,

<sup>15</sup> We note that this approach would also directly respond to the D.C. Circuit's challenge to the Board to explain the theory underlying its deferral policy (see, e.g., Darr v. NLRB, 801 F.2d at 1408-1409; Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 755-757 (D.C. Cir. 1992)), as well as to that court's "contractual waiver" approach to Board deferral cases, which does not so much balance the two competing statutory goals of the NLRA as hold that one completely trumps the other (see, e.g., American Freight System, Inc. v. NLRB, 722 F.2d 828, 832-833 (D.C. Cir. 1983); Plumbers & Pipefitters Local Union No. 520, 955 F.2d at 755-756; Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448-449 (D.C. Cir. 2004)).

<sup>16</sup> See, e.g., Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) ("If the record contains substantial and definite indications that the unfair labor practice issue and its supporting evidence were expressly presented to the arbitration panel, and the panel's decision reflects its reliance on that evidence, then the Board and a court can determine whether the panel clearly decided the statutory issue"); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199, 202-203 (1st Cir. 1981) ("Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute"); NLRB v. Magnetics Intern., Inc., 699 F.2d 806, 811 (6th Cir. 1983) ("we will examine the arbitrator's award itself and the degree of congruence

the Board held that the party urging deferral must show that the unfair labor practice issue was presented to and acted upon by the arbitrator.<sup>17</sup> That is, the Board would consider an unfair labor practice issue resolved only if the statutory issue was actually litigated and decided in the arbitration proceeding.<sup>18</sup> While the Board deviated from this policy for a period,<sup>19</sup> it subsequently reinstated the requirement that the party seeking deferral show that the statutory issue was "presented to and considered" by the arbitrator.<sup>20</sup> The Board explained that acting otherwise "derogates the [ ] important purpose of protecting employees in the exercise of their rights under Section 7 of the Act," and had been criticized "as an unwarranted extension of the Spielberg doctrine and an impermissible delegation of the Board's exclusive jurisdiction."<sup>21</sup>

Returning to a requirement that statutory issues be considered as a condition for deferral to an arbitral award would also require revising the standards for deferral to pre-arbitral grievance settlements. Thus, the Olin deferral standard was the express basis for the Board's decisions in

---

between the award and the charges brought under the statute . . . any doubts regarding the propriety of deferral will be resolved against the party urging deferral"); Servair, Inc. v. NLRB, 726 F.2d 1435, 1441 (9th Cir. 1984) ("The arbitrator's determination . . . in no way disposes of the statutory issue . . . Thus, we hold that the Board properly refused to defer to the arbitrator's decision").

<sup>17</sup> Raytheon Co., 140 NLRB 883, 886-887 (1963), enf. denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

<sup>18</sup> See Yourga Trucking Inc., 197 NLRB 928, 928 (1972); Airco Industrial Gases, 195 NLRB 676, 676-677 (1972).

<sup>19</sup> See Electronic Reproduction Service Corp., 213 NLRB 758, 762-764 (1974).

<sup>20</sup> Suburban Motor Freight, Inc., 247 NLRB 146, 146-147 (1980).

<sup>21</sup> Ibid. See also Professional Porter & Window Cleaning Co., 263 NLRB 136, 137 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983) ("The election to proceed in the contractually created arbitration forum provides no basis, in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges").



Alpha Beta<sup>22</sup> and Postal Service.<sup>23</sup> As a result, these cases similarly provide for deferral to pre-arbitral grievance settlements that lack reference to, or other indication that the parties considered, the statutory issues. It would be inconsistent to continue to defer to pre-arbitral-award grievance settlements that the parties themselves did not intend to resolve the unfair labor practice issues. Instead, we will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement, including review under the standards of Independent Stave.<sup>24</sup>

#### V. Instructions for Processing Future Cases Involving Deferral to Arbitration

Providing a more thorough post-arbitral review of deferred cases necessitates certain other changes in Regional Office investigation procedures. We recognize that a full investigation and conclusive determination of merit prior to pre-arbitral deferral is not the best use of limited Agency resources. Nonetheless, because substantial time may pass while the arbitration process proceeds when a case is deferred under Collyer and United Technologies,<sup>25</sup> investigation of the alleged unfair labor practices at the end of the process is more difficult. To prevent any such difficulties in future cases raising allegations of Section 8(a)(1) and 8(a)(3) that will be deferred under Collyer, particularly as a heightened

<sup>22</sup> 273 NLRB 1546, 1547-1548 (1985).

<sup>23</sup> 300 NLRB 196, 198 (1990).

<sup>24</sup> Independent Stave Co., 287 NLRB 740, 743 (1987) (the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements).

<sup>25</sup> Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 557 (1984). These instructions also apply to cases deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963).

standard would likely make at least some additional arbitral awards inappropriate for deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their "arguable merit" determination in considering Collyer deferral.<sup>26</sup> Only then, if the Region determines there is arguable merit to the charge and the other Collyer requirements are met, should the Region defer the charge.<sup>27</sup> If the Region concludes the charge is without merit, of course, it should dismiss the charge, absent withdrawal.

In all pending and future cases where the Region has deferred a charge to arbitration under Collyer, when the arbitral award issues, the Region must review the award to determine whether post-arbitral deferral is appropriate. The Region should determine if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.<sup>28</sup>

## VI. Conclusion

To summarize, we will urge the Board to modify its approach in Section 8(a)(1) and (3) post-arbitral deferral cases as follows:

1. The party urging deferral should have the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory

<sup>26</sup> At the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

<sup>27</sup> In light of the modified post-arbitral framework proposed herein, Regions should substitute the language of the attached pattern for Collyer deferral letter for that found in the Casehandling Manual Section 10118.5.

<sup>28</sup> An exception to this instruction occurs when the arbitral award grants full backpay and reinstatement and the charging party requests withdrawal of the charge. In this situation, as with non-Board settlements discussed above, the request for withdrawal can be approved. If the charging party does not seek withdrawal in this situation, the Region should contact the Division of Advice.

issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

2. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

3. The Board should not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures, including review under the standards of Independent Stave.

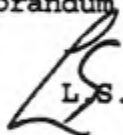
In processing future cases raising allegations of Section 8(a)(1) and 8(a)(3), Regions should proceed as follows:

1. Prior to Collyer deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their arguable merit determination.

2. If there is arguable merit to the charge, and the other Collyer requirements are met, the Region should defer the charge. If there is not arguable merit, the Region should dismiss, absent withdrawal.

3. When the arbitral award issues, the Region should determine if the party urging deferral has met the burden set forth above to demonstrate that deferral to the arbitrator's award is appropriate. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.

Please make this memorandum a subject on the agenda for your next staff meeting. Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

 L.S.

cc: NLRBU  
Release to the Public

MEMORANDUM GC 11-05

## Collyer Deferral Letter

[Regional Office Letterhead]

[Date letter issues]

Charging Party Legal Rep (or Charging  
Party if no legal rep)

Charged Party Legal Rep (or Charged Party  
if no legal rep)

Re: [Case name]  
Case [Case number]

Salutation:

The Region has carefully considered the charge alleging that [Charged Party name] violated the National Labor Relations Act. As explained below, I have decided that further proceedings on the charge should be handled in accordance with the deferral policy of the National Labor Relations Board as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). This letter explains that deferral policy, the reasons for my decision to defer, further processing of the charge, and the Charging Party's right to appeal my decision.

**Deferral Policy:** The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. This policy is partially based on the preference that the parties use their contractual grievance procedure to achieve a prompt, fair, and effective settlement of their disputes. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Board's Regional office will defer the charge.

**Decision to Defer:** Based on our investigation, I am deferring further proceedings on the charge in this matter to the grievance/arbitration process for the following reasons:

1. The Employer and the (Charging Party name or insert name of the Union if charge filed by an individual) have a contract currently in effect that provides for final and binding arbitration.
2. The [insert description of each issue being deferred] as alleged in the charge (is or are) encompassed by the terms of the contract.
3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the issues in the charge appear to be covered by provisions of the contract, it is likely that the issues may be resolved through the grievance/arbitration procedure.

**Further Processing of the Charge:** As explained below, while the charge is deferred, the Regional office will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.

**Charging Party's Obligation:** Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly submit the grievance to the grievance/arbitration process or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.

**Union/Employer Conduct:** If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and the Charging Party, I may revoke deferral and resume processing of the charge.

**Charged Party's Conduct:** If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed, or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

**Monitoring the Dispute:** Approximately every 90 days, the Regional office will ask the parties about the status of this dispute to determine if the dispute has been resolved and if continued deferral is appropriate. However, at any time a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint.

**Notice to Arbitrator Form:** If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the arbitrator sends the award to the parties.

**Review of Arbitrator's Award or Settlement:** If the grievance is arbitrated, the Charging Party may ask the Board to review the arbitrator's award. The request must be in writing and addressed to me. Under current Board law, the request should analyze whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is consistent with the Act. Further guidance on this review is provided in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). These Board decisions are available on our website, [www.nlrb.gov](http://www.nlrb.gov). However, the current standard for review may change. The General Counsel's position is that the Board should modify its approach in Section 8(a)(1) and (3) cases and should not defer to an award unless the party urging deferral demonstrates that: (1) that the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) that the arbitrator correctly enunciated the applicable statutory principles, and applied them in deciding the issue. The General Counsel is also taking the position that the Board should not defer to a pre-arbitral-award grievance settlement in Section 8(a)(1) and (3) cases unless the parties intended the settlement to also resolve unfair labor practice issues.

**Note:** SAME APPEAL LANGUAGE as now.



## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-07

September 30, 2010

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Section 10(j) Remedies for Unlawful Discharges in  
Organizing Campaigns

An important priority during my time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplaces. When an employer commits such unfair labor practices, it "nips in the bud" all of the employees' efforts to engage in the core Section 7 right to self-organization.

Discriminatory discharges are among the most serious nip-in-the-bud violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights. As one court has characterized employees' reaction, "no other worker in his right mind would participate in a union campaign in this plant after having observed that other workers who had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated." *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, 125 LRRM 2152 (S.D.N.Y. 1986). In addition, the continued absence from the workplace of unlawfully discharged union leaders means not only that the negative message from the unfair labor practices persists but also that the remaining employees are deprived of the leadership of active and vocal union supporters. And with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board. Given all of these consequences, employee resumption of union organizing is unlikely, and the ultimate Board order is ineffective to protect rights guaranteed by the Act.

Over the years, the Agency has developed a variety of very effective strategies for minimizing these consequences. First, we have focused on prompt investigation of "nip-in-the-bud" cases and prompt settlement of meritorious charges. Such settlements are a timely and highly effective remedy. In addition, in some of the meritorious nip-in-the-bud cases which did not settle, the Board authorized Section 10(j) proceedings and we obtained injunctions. Like settlements, these Section 10(j) injunctions have provided a substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order.



My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. For years the Agency has been committed to a vigorous Section 10(j) injunction program as a highly effective tool for achieving meaningful real time remedies. As Acting General Counsel, I am committed to continue and enhance this important program for nip-in-the-bud cases. In addition, I am committed to the most expeditious administrative litigation possible for such cases. The program outlined below has been developed to streamline the processing of nip-in-the-bud cases involving discharges to assure that the passage of time does not undercut our ability to provide effective remedies in these cases.

This program covers all stages of case processing—from identification of cases as potential Section 10(j) cases by Regional Offices through Board authorization and litigation of Section 10(j) cases to trial and decision of the merits cases. This program has been developed with invaluable input from all offices of the Agency, especially from the field. I intend to continually monitor whether the program is successful in achieving effective and timely remedies in organizing cases and to see how these priorities actually function in the context of the day-to-day work of your offices. In consultation with you, I will evaluate what, if any, modifications are needed.

Set forth below is what I consider the optimal timeline for processing nip-in-the-bud cases and additional procedures to facilitate these streamlined procedures. The timeline and procedures should be considered as best practices by all branches and regional offices in handling these cases.

#### Optimal Timeline for Processing Nip-in-the-bud Discharge Cases

- Potential Section 10(j) organizing campaign discharge cases should be identified as soon as possible after the filing of the charge and tracked by the Region until their resolution. In addition, it is critically important that Regions identify such cases in CATS, and subsequently in NxGen, by adding "discharge organizing campaign" in Notes, which will permit reporting on the number and handling of these cases.
- Where possible, the lead affidavit should be taken within 7 calendar days from filing of charge in all nip-in-the-bud discharge cases.
- Regions should attempt to obtain all of the charging party's evidence within 14 calendar days from the filing of the charge.
- If charging party's evidence points to a *prima facie* case on the merits and suggests the need for injunctive relief, the Region should notify the charged party in writing that the Region is seriously considering the need for Section 10(j) relief and request that a position statement on that issue

be submitted to the Regional Office within 7 calendar days after the written notification. This letter can be combined with the letter putting the charged party on notice of the allegations raised by the charge and should generally be sent within 21 days from the filing of the charge.

- A Regional Director will normally make a determination on the merits of the case within 49 calendar days from the filing of the charge. If the decision is to issue complaint, the decision with respect to the need for Section 10(j) relief should be made at the same time.
- Regions will endeavor to quickly issue complaints in these nip-in-the-bud discharge cases and to set prompt administrative hearings. When estimating the length of a trial for purposes of trial schedules, Regional Attorneys should allow sufficient time to finish a trial and to avoid the possibility of a continuance. If Regions encounter any problems with obtaining early and continuous hearing dates, they should immediately contact Operations Management.
- Regions must submit to the Injunction Litigation Branch (ILB) all meritorious 8(a)(3) discharge nip-in-the-bud cases, including those currently pending in Regions and those pending before an administrative law judge, that do not settle. I will personally review and decide whether Section 10(j) authorization should be sought in all such cases. Neither discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief. A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights. And a court order offering interim reinstatement may cause the resumption of employee interest in organizing with the previous or a new union, whether or not the offer is accepted.
- Regions may use the Expedited Hearing Procedures (GC Memorandum 94-17 and OM Memorandum 06-60) in lieu of immediately seeking Section 10(j) authorization if a non-cooperating respondent has raised a significant *Wright Line* or economic defense or if proceeding to the administrative hearing would seriously facilitate settlement. Expedited hearings in such cases should be scheduled not later than 28 calendar days after issuance of complaint. If the Region is unable to obtain a 28-day hearing from the Division of Judges, please immediately contact Operations Management.
- A short form memorandum regarding Section 10(j) relief in nip-in-the-bud cases should be submitted to ILB. Absent unusual circumstances, this memorandum should be submitted to ILB not later than 7 calendar days from the merit determination or close of an expedited hearing. Regions

will also submit to ILB the parties' position statements, if any, and party representative information.

- ILB will decide all nip-in-the-bud Section 10(j) cases within 2 business days after receipt of the Region's memorandum and will notify the Region as to whether it agrees that Section 10(j) relief is warranted. If ILB has questions for the Region before it is able to decide the Section 10(j) request, it will seek this information as soon as possible after reviewing the case.
- In these cases, ILB will prepare a 1-2 page cover memorandum, addressing briefly only relevant new facts obtained from the Region and issues not addressed by the Region that might be of interest to the Board. ILB will send this memorandum to the Acting General Counsel within 7 calendar days after receiving the last information it needs from the Regional Office. ILB will also forward a copy to the Region.
- I will review and decide the Section 10(j) case, and if I agree, I will sign the memorandum requesting Section 10(j) authorization within 2 business days of receipt from ILB. Upon my approval, ILB will submit the Section 10(j) request to the Board and notify the Region.
- Within 10 business days after receiving notice from the ILB that it agrees Section 10(j) relief is warranted in these nip-in-the-bud cases, the Region will draft its Memorandum of Points and Authorities and Proposed Order and send it to ILB for review. Within 3 business days of receipt, ILB will complete its review, make substantive comments and provide additional/different arguments, case support, and any modifications to the order and return the papers to the Region for filing with the court if the Board so authorizes.
- Regions will file papers with the District Court within 2 business days from notification that the Board has authorized Section 10(j) relief or receipt from ILB of its review of draft court papers, whichever is later. As in the past, if the Region believes that the time for filing should be postponed for good reason, such as settlement discussions, it should consult with ILB regarding whether additional time for filing should be allowed.

**Additional Best Practice Procedures to Facilitate Timely Processing of Nip-in-the-bud Discharge Cases:**

- When it is clear that documentary evidence or the testimony of neutral witnesses is needed during an investigation, the Region should make a request for the documents or witnesses and if it is not forthcoming, investigative subpoenas should be issued. Regions should not wait for the decision-making agenda to issue necessary subpoenas.

- Regions are encouraged to assign more than one agent, when needed, to investigate and prepare Section 10(j) cases involving nip-in-the-bud discharges.
- "Just and proper evidence" should be taken at the same time in the investigative process as obtaining the evidence on the merits of the charge.
- Because multiple charges are filed as new events unfold, the time for making a Regional 10(j) determination may become protracted. Consistent with OM 01-33, Regions should focus on the core allegations for which Section 10(j) is needed in organizing campaign discharge cases. By proceeding with the Section 10(j) case before opening the administrative hearing, including using affidavits rather than the administrative transcript, the Region may complete its investigation of later-filed non-10(j) charges and avoid *Jefferson Chemical* problems while at the same time seeking Section 10(j) relief on the core violations.
- When considering whether Section 10(j) relief is appropriate, the Region should inform the parties that the Region is prepared to seek Section 10(j) authorization seeking reinstatement of discharged employees. These conversations should be documented in the investigative file.
- To avoid adjournments and postponements, when scheduling the administrative hearing, the Region should liberally estimate the number of days required for the case to be heard.
- Once before an administrative law judge, the Region should oppose any request for postponement or extensions of time for filing documents. If a postponement is granted, the Region should contact ILB to evaluate whether a special appeal contesting the postponement should be filed with the Board.
- Regions generally should consult with ILB if Regions desire to use the administrative record instead of affidavits to try the Section 10(j) case. However, if a Region is confident that the administrative record will close within 2-3 weeks after receiving Board authorization, the Region may independently decide to try the case on the administrative record and move the court to do so when filing its Section 10(j) petition. The Region should notify ILB of its decision to do so.

The key to success of this program is the free flow of information and communication between the Region and ILB throughout the process. Regions should not hesitate to contact ILB for advice and assistance at all phases of their Section 10(j) work.

These cases can drain resources in the field. As soon as you identify a Section 10(j) case where the adequacy of your resources is an issue, please notify your Deputy or AGC in Operations Management and assistance will be provided. In addition, in evaluating your staffing needs overall, if you have an active Section 10(j) program which you believe has not been sufficiently factored in to your staffing, please consult with your Deputy or AGC. I also ask that you advise your local Practice and Procedure Committees of this program and request their full cooperation in expediting these very important cases.

I trust that you will embrace this critical program with the same high level of enthusiasm and commitment with which you perform all of your duties so that, together, we can enhance our ability to effectuate the Agency's mission.

  
L.S.

cc: NLRBU  
NLRBPA  
Release to the Public

MEMORANDUM GC 10-07



## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-01

December 20, 2010

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Remedies in Organizing Campaigns

### I. Introduction

The protection of employee free choice regarding unionization is a keystone of the Agency's mission, and I am committed to making the principle of employee free choice meaningful. Accordingly, as Acting General Counsel I have placed a priority on ensuring that the Agency protects employee freedom of choice with regard to unionization by obtaining effective remedies for employers' unlawful conduct during union organizing campaigns. In Memorandum GC 10-07, I outlined my commitment to seek Section 10(j) injunctive relief as a quick and effective remedy for an employer's serious unlawful conduct during union organizing campaigns. But, to fully ensure that the Agency protects employee freedom of choice with regard to unionization, we must seek remedies that enhance the effectiveness of Section 10(j) and Board relief.

In Memorandum GC 10-07, I announced an initiative to seek 10(j) relief in all discriminatory discharges during organizing campaigns (so-called "nip-in-the-bud" cases) because they have a severe impact on employees' Section 7 rights. In such cases, the discharges are often accompanied by other serious unfair labor practices such as threats, solicitation of grievances, promises or grants of benefits, interrogations and surveillance.<sup>1</sup> These additional unfair labor practices

---

<sup>1</sup> See, e.g., Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069 (2004) (where employer discharged an employee one day before an election, it also threatened job loss and plant closure through its chairman of its board of directors, threatened employees with arrest, created impression of surveillance, videotaped employees, interrogated employees, promised better benefits, increased wages, solicited employees to repudiate the union and revoke authorization cards, prohibited employees from discussing the union but allowed them to discuss other non-work subjects, prohibited off-duty employees access to its facility to talk to coworkers, and restricted the locations of employees' breaks to deny employees from discussing wages, benefits, and terms and conditions with fellow employees); Blockbuster Pavilion, 331 NLRB 1274 (2000) (in addition to refusing pro-union employees work, employer threatened discharge for union activity, threatened to burn its facility before allowing a union



also have a serious impact on employee free choice, as they inhibit employees from engaging in union activity and dry up channels of communication between employees. Thus, in order to provide an effective remedy in these cases, it is just as necessary to remove that impact as it is to remove the impact caused by an unlawful discharge.<sup>2</sup>

In many of these cases, the impact is inherent in the nature of the unfair labor practice. "Hallmark" violations such as discharging employees and threats of job loss and plant closing, for example, "can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."<sup>3</sup> No reasonable employee would engage in any protected activity after witnessing a discharge of a fellow employee for similar conduct; and just as chilled from repeating such activity is the discharged employee, himself, who is now unemployed because he exercised his statutory rights.<sup>4</sup> Furthermore, threats of plant closure or job loss severely and equally affect all employees in the plant.<sup>5</sup> Faced with a threat of loss of work, employees will abandon unionization efforts and effectively relinquish their free choice.

---

to represent its employees, and interrogated employees); United States Service Industries, 319 NLRB 231 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997) (employer discharged ten employees, refused to reinstate unfair labor practice strikers, threatened employees that their union activities would result in discharge, interrogated and surveilled employees, prohibited employees from discussing the union at worksites, and awarded bonuses to non-union employees).

<sup>2</sup> See Federated Logistics, 340 NLRB 255, 256-257, enfd. 400 F.3d 920 (D.C. Cir. 2005) (unfair labor practices during organizational campaigns can jeopardize the possibility that an election will accurately reflect the employees' free choice); Fieldcrest Cannon, Inc., 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65, 74 (4th Cir. 1996).

<sup>3</sup> Consec Security, 325 NLRB 453, 454 (1998), enfd. 185 F.3d 862 (3d Cir. 1999). See also Federated Logistics, 340 NLRB at 257 (threats of plant shutdown "serve as an insidious reminder to employees that every time they come to work that efforts on their part to improve their working conditions may not only be futile but may result in the complete loss of their livelihoods").

<sup>4</sup> Eddyleon Chocolate Co., 301 NLRB 887, 891 (1991) (unlawful discharges affect remaining employees who reasonably fear that they too will lose employment if union activity persists).

<sup>5</sup> Spring Industries, 332 NLRB 40, 41 (2000). Compare Crown Bolt, Inc., 343 NLRB 776, 777-779 (2004) (overruling Spring Industries to the extent it held that the Board would presume widespread dissemination of plant closure threats absent evidence to the contrary, while still agreeing that plant closure threats are "a grave matter" and "highly coercive of employee rights").

Similarly, an employer's promise or grant of benefits also has a devastating impact on employee free choice because "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."<sup>6</sup> Employees are less inclined to exercise their free choice if they know that they will gain benefits by not supporting a union and conversely, that they will lose benefits if they do support a union.

The serious effect of other, non-hallmark violations can not be overlooked. Thus, for example, an employer's solicitation of grievances chills employee unionization efforts because it demonstrates both that employees' efforts to unionize are unnecessary and that the employer will only improve working conditions as long as the workplace remains union-free.<sup>7</sup> In either case, an employer's sudden solicitude towards employees' needs—especially where they previously were ignored—demonstrates to employees the extent to which an employer is willing to go to avoid unionization.

Interrogations and surveillance also have an inhibiting effect on employee free choice. Interrogations have a "natural tendency to instill in the minds of employees fear of discrimination on the basis of information the employer has obtained."<sup>8</sup> Likewise, surveillance or the impression of surveillance inhibits employees' lawful participation in activities by highlighting "that the employer is anxious to find out about union activity which the employees wish to conceal from him to avoid retaliation."<sup>9</sup> If an employer engages in interrogation or surveillance, employees will be less likely to engage in protected activity and express their free

---

<sup>6</sup> NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove"); Evergreen America Corp., 348 NLRB 178, 180 (2006) (unlawful grants of significant benefits "have a particularly longlasting effect on employees and are difficult to remedy by traditional means. . ."), citing Gerig's Dump Trucking, 320 NLRB 1017, 1018 (1996), *enfd.* 137 F.3d 936 (7th Cir. 1998).

<sup>7</sup> Center Service System Division, 345 NLRB 729, 730 (2005), *enfd.* in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); Alamo Rent-A-Car, 336 NLRB 1155, 1155 (2001) (employer solicited grievances "in order to blunt the employees' enthusiasm for, or at least perceived need for, the Union").

<sup>8</sup> NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953).

<sup>9</sup> Lundy Packing Co., 223 NLRB 139, 147 (1976), *enfd.* in relevant part 549 F.2d 300 (4th Cir. 1977); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 104 n.7 (5th Cir. 1963).

choice because of concern that the employer is trying to learn about their views on unionization and that an employee's actions, either by what he says to the employer, or how he behaves around the workplace, will likely be used to affect his job security or result in economic reprisal.

Finally, any employer conduct that interferes with employees' ability to communicate between themselves and with a union has a damaging impact on employee free choice.<sup>10</sup> Employees must be able to discuss the advantages and disadvantages of organization together and lend each other support and encouragement—such full discussion lies at the very heart of organizational rights guaranteed by the Act.<sup>11</sup> If an employer unlawfully limits employees' opportunities to discuss unionization, employees are unable to assert their statutory rights and talk freely about working conditions and organizing.<sup>12</sup>

The coercive effect of any of this conduct is often magnified by the involvement of high ranking officials,<sup>13</sup> the swiftness of an employer's response to a union campaign,<sup>14</sup> and the proximity to a union's demand for recognition or the filing of a representation petition.<sup>15</sup>

---

<sup>10</sup> Republic Aviation v. NLRB, 324 U.S. 793, 803 (1945) (such rules are "an unreasonable impediment to self-organization").

<sup>11</sup> Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972) (the right of self-organization depends in some measure on the ability of employees to learn the advantages and disadvantages of self-organizations from others).

<sup>12</sup> See NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views" by employees).

<sup>13</sup> NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1369-1370 (1981) (noting that impact of unfair labor practices is augmented by participation of upper management). See also Excel Case Ready, 334 NLRB at 5 (involvement of upper managers "exacerbates the natural fear of employees that they will lose employment if they persist in their union activities," and is "likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies"), quoting Garney Morris, Inc., 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995); Consec Security, 325 NLRB at 454-455 ("When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten").

<sup>14</sup> See General Fabrications Corp., 328 NLRB 1114, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) ("impact of [employer's unlawful conduct] was magnified by its proximity to the onset of the Union's organizational effort"); United States Service Industries, 319 NLRB at 232 (employer's "swift and widespread action each time its employees have attempted to enlist the aid of the Union [was] aimed at ensuring that employees think twice before doing so again"); Bakers of Paris, 288 NLRB 991, 992 (1998), enfd. 929 F.2d 1427 (9th Cir. 1991) (effect of

Because the impact of these unfair labor practices during organizing campaigns is so severe, I want to ensure that, in addition to swiftly remedying unlawful discharges, the impact of these ancillary unfair labor practices is removed as well. In order to remove the impact, we must tailor remedies to recreate an atmosphere that allows employees to fully utilize their statutory right to exercise their free choice. Therefore, in addition to seeking 10(j) reinstatement in all cases involving a discharge during an organizing campaign, Regions should also consider whether to seek additional remedies to remove the impact of the discharge(s), as well as the other Section 8(a)(1) violations. I believe that, in such cases, we have an obligation to seek remedies that are designed to eliminate these coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights.

In all organizing cases, the remedial touchstone should be prompt and effective relief to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 right to make a free choice regarding unionization. The Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act and are tailored, as much as possible, to undo the harm created by unfair labor practices.<sup>15</sup> Implicit in this statement of the Board's authority is the obligation to articulate why additional remedies are necessary.<sup>17</sup> The rationale for each of

---

unfair labor practices increases when violations begin when employer has knowledge of union campaign).

<sup>15</sup> Consec Security, 325 NLRB at 454, citing Electro-Voice, Inc., 320 NLRB 1094, 1095 (1996) and Astro Printing Services, 300 NLRB 1028, 1029 (1990). See also Homer D. Bronson Co., 349 NLRB 512, 515, 549 (2007), *enfd.* 273 Fed. Appx. 32 (2d Cir. 2008) (employer's conduct was coercive enough to warrant additional remedies where it committed several unfair labor practices within a week of the union filing a petition).

<sup>16</sup> J.H. Rutter Rex Mfg. Co., 396 U.S. 258, 260-263 (1969). See also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898 (1984); Ishikawa Gasket America, Inc., 337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case"); Excel Case Ready, 334 NLRB at 5 (Board has broad discretion to fashion a just remedy to fit the circumstances of each case it decides).

<sup>17</sup> See, e.g., Chinese Daily News, 346 NLRB 906, 909 (2006) ("extraordinary" notice-reading remedy not appropriate, because "neither the General Counsel nor the dissent have offered any evidence to show that the Board's traditional remedies are insufficient" to remedy multiple violations, including threats of job loss, where violations happened four years prior and any "lingering effects" were "not at all clear"); Register Guard, 344 NLRB 1142, 1146 n.16 (notwithstanding multiple 8(a)(1) violations, including a hallmark unit-wide wage increase, "the



these remedies is provided below. In arguing for such remedies, Regions should articulate the lasting or inhibitive coercive impact inherent in the violations alleged, as explained above, use additional evidence adduced, where available, to demonstrate the actual impact of the violations and, as shown below, explain how the remedy sought will remove that impact.

## **II. Appropriate Remedies to Seek**

In nip-in-the-bud organizing cases, the remedial goal should be to recreate an atmosphere free from the effects of an employer's unfair labor practices. The Board's cease-and-desist and notice posting remedies announce to employees, who have been subjected to interference, restraint, and coercion with respect to their right to select a bargaining representative, that they have a protected right to engage in such activity free from unlawful reprisal. Similarly, the reinstatement and backpay remedies aim to "make whole" an affected employee. But because unlawful discharges and other violations during an organizing drive have a lasting or particularly inhibitive effect on the exercise of Section 7 rights and on the Board's ability to conduct a fair election, we must do more to counteract the impact of that unlawful conduct. GC 10-07 provides that when a Region determines that a case involving a nip-in-the-bud discharge has merit, it should submit the case for consideration of 10(j) relief. In addition, Regions are hereby authorized, at the same time, to include in their Complaint any of the remedies listed below that are appropriate to remedy the discharge itself, as well as serious ancillary unfair labor practices. Finally, Regions should include in their 10(j) submissions a recommendation regarding seeking in Section 10(j) proceedings any of these remedies included in their Complaint.

### **1. Notice Reading – Appropriate in nip-in-the-bud cases**

Notice-reading remedies generally require that a responsible management official read the notice to assembled employees or, at the respondent's option, have a Board Agent read the notice in the presence of a responsible management official. The public reading of a notice has been recognized as an "effective but moderate way to let in a warming wind of information and, more important, reassurance."<sup>18</sup> By imposing such a remedy, the Board can assure

---

Charging Party has not shown a basis for imposing" a notice-reading remedy); First Legal Support Services, LLC, 342 NLRB 350, 350 n.6 (2004) (additional remedies not warranted, notwithstanding multiple violations, including repeated threats of discharge and plant closure as well as the actual discharge of two union supporters, where "[n]either the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing" additional remedies).

<sup>18</sup> United States Service Industries, 319 NLRB at 232 quoting J.P. Stevens & Co., v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969). See also Concrete Form Walls, Inc., 346 NLRB 831, 841 n.3 (2006) (Member Schaumber, dissenting in part) (notice-

the respondent's "minimal acknowledgment of the obligations that have been imposed by the law. . . . The employees are entitled to at least that much assurance that their organizational rights will be respected in the future."<sup>19</sup> A notice reading will also ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the employer's bulletin boards. A reading will also allow all employees to take in all of the notice, as opposed to hurriedly scanning the posting, under the scrutiny of others.<sup>20</sup>

In addition to ensuring that the notice's content reaches all the employees, a personal reading places on the Board's notice "the imprimatur of the person most responsible" and allows employees to see that the respondent and its officers are bound by the Act's requirements.<sup>21</sup> For example, where an employer discharged a union supporter or made threats of plant closure, hearing the Board's cease-and-desist language read will better serve to allay the employees' fear that union activity at work will be met with reprisal. Furthermore, where a high ranking manager personally committed some of the violations, hearing that manager read the notice, or seeing him present while it is read, will "dispel the atmosphere of intimidation he created" and best assure employees that their rights will be respected.<sup>22</sup> Finally, a notice-reading remedy is more effective at remedying violations during an organizing drive than a traditional notice posting because of its heightened psychological impact on employees; "[f]or an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve."<sup>23</sup>

---

reading remedy "gives teeth to other notice provisions" that the respondent must also announce).

<sup>19</sup> Federated Logistics, 340 NLRB at 258 n.11. See also United States Service Industries, 319 NLRB at 232 (reading allows employees to gain assurance from a high level employer representative that they view "as the personification of the Company" that an employer will respect their rights).

<sup>20</sup> Regions should specifically seek language in an Order that the notice should be read to the widest possible audience. See, e.g., Vincent/Metro Trucking, LLC, 355 NLRB No.50, slip op. at 2 (2010).

<sup>21</sup> Loray Corp., 184 NLRB 557, 558 (1970).

<sup>22</sup> Three Sisters Sportswear Co., 312 NLRB 853, 853 (1993), enfd. mem 55 F.3d 684 (D.C. Cir. 1995).

<sup>23</sup> Teeter, Fair Notice: Assuring Victims of Unfair Labor Practices that their Rights will be Respected, 63 UMKC L. Rev 1, 11 (Fall, 1994).



## **2. Access Remedies – Appropriate in cases where there is an adverse impact on employee/union communication**

The full exercise by employees of their Section 7 rights requires that employees be fully informed not only concerning those rights, but also concerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization, as their bargaining representative. Where an employer unlawfully interferes with communications between employees, or between employees and a union, the impact of that interference requires a remedy that will ensure free and open communication. Allowing union access to the employer's bulletin boards and providing the union with the names and addresses of employees will restore employee/union communication and assist the employees in hearing the union's message without fear of retaliation.<sup>24</sup> These access remedies assure the employees that they can learn about unionization and can contact union representatives in an atmosphere free of the restraint or coercion generated by an employer's violations.<sup>25</sup>

### *a. Access to bulletin boards*

An order requiring an employer to permit access to its bulletin boards will broaden the opportunity for employee/union communication.<sup>26</sup> Union access to bulletin boards permits employees to see, at the workplace, that open displays of union information are acceptable, and will better thaw the chilling impact of the violations than the bare recitation of rights in a standard notice posting.<sup>27</sup> Access to bulletin boards is the least intrusive of access remedies, and it "serves to

---

<sup>24</sup> Teamsters Local 115 v. NLRB, 640 F.2d 392, 399 (D.C. Cir. 1981), *enfg.* 242 NLRB 1057 (1979). See also United States Service Industries, 319 NLRB at 232, quoting United Dairy Farmers Cooperative Assn., 242 NLRB 1026, 1029 (1979), *enfd.* in relevant part 633 F.2d 1054 (3d Cir. 1980).

<sup>25</sup> See Jonbil, Inc., 332 NLRB 652, 652 (2000); United States Service Industries, 319 NLRB at 232.

<sup>26</sup> Where an employer customarily uses electronic means, such as an electronic bulletin board, e-mail, or intranet postings to communicate with employees, Regions should submit the case to the Division of Advice on whether to seek a remedy including union access to those electronic means of communication. See J. Picini Flooring, 356 NLRB No. 9 (2010) (electronic notice posting appropriate where employer regularly utilized electronic bulletin board to communicate with employees).

<sup>27</sup> Excel Case Ready, 334 NLRB at 5 (bulletin-board access remedy provides employees with "reassurance that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear [of retaliation by the employer]").

reduce the obstacles to free union-employee communication" that were created by the employer's coercive conduct, and reassures the employees that the union has a "legitimate role to play in their decision whether to seek union representation."<sup>28</sup>

*b. Employee names and addresses*

A names-and-addresses remedy typically requires the employer to provide the union with an updated list of employees' names and addresses, for a longer and earlier time period than would be required under Excelsior Underwear.<sup>29</sup> If an employer's unlawful conduct during an organizing campaign disrupts Section 7 rights and election conditions, the union must restart its organizing campaign and employees will have reason to fear discussing unionization in the workplace because of the employer's past conduct.<sup>30</sup> "To neutralize the effect of the Respondent's face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union's point of view with respect to organizational activities."<sup>31</sup> The names-and-addresses remedy "attempts to level a playing field that has been tilted against the employees' organizational rights" by the employer's unfair labor practices and enables the union to contact all the employees outside the work environment free from management's watchful

---

<sup>28</sup> Blockbuster Pavilion, 331 NLRB at 1276. See also J.P. Stevens & Co. v. NLRB, 388 F.2d 896, 906 (2d Cir. 1967) (union access to bulletin boards appropriate to offset the company's use of bulletin boards in coercive campaign against the union and to "dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign"); John Singer, Inc., 197 NLRB 88, 90 (1972) (union access to bulletin boards necessary because additional forms of communication were needed to allow the union to reclaim allegiance lost as a result of the company's unlawful conduct).

<sup>29</sup> Excelsior Underwear Inc., 156 NLRB 1236 (1966).

<sup>30</sup> The Board has expressly rejected the argument that a names-and-addresses remedy is unnecessary because the union will obtain an Excelsior list of names and addresses in the event an election is scheduled. See, e.g., Federated Logistics, 340 NLRB at 256-258; Blockbuster Pavilion, 331 NLRB at 1275. Providing names and addresses shortly before the election, as with the Excelsior list, is insufficient. Rather, a remedial provision of names and addresses for a longer and earlier time period is designed to restore "the conditions that are a necessary prelude to a free and fair election." Blockbuster Pavilion, 331 NLRB at 1275.

<sup>31</sup> Heck's, Inc., 191 NLRB 886, 887 (1971), *enfd.* as amended 476 F.2d 546 (D.C. Cir. 1973).

eye.<sup>32</sup> Thus, this remedy is necessary because it facilitates communication between the union and employees outside the employer's domain, and therefore, "insulated from discriminatory reprisal."<sup>33</sup>

### **III. Instructions to Regions for Investigating and Litigating These Cases**

In addition to submitting 8(a)(3) nip-in-the-bud cases for 10(j) relief pursuant to Memorandum GC 10-07, Regions should seek a notice-reading remedy in all such cases and should consider seeking a notice-reading remedy where an employer has committed serious Section 8(a)(1) violations. Hallmark violations such as threats of discharge and plant closure, and promises or grants of benefits, and other serious violations such as solicitation of grievances, high-level or widely disseminated interrogations, and surveillance or impression of surveillance have a pronounced impact on employee free choice. A notice reading remedy will effectively assure employees that their rights will be respected.

When the employer's unfair labor practices interfere with communications between employees, or between employees and a union,<sup>34</sup> Regions should also seek union access to bulletin boards and employee names and addresses.

Regions are authorized to plead these remedies in their Complaint. In addition, Regions should include in their recommendation regarding 10(j) relief whether they would seek on an interim basis the remedies included in their Complaint. A combination of these remedies, as part of our 10(j) relief, will ensure that employees' Section 7 rights are adequately protected and that their ability to exercise free choice regarding unionization is promptly restored.

If a Region determines that an employer's unfair labor practices have had such a severe impact on employee/union communication that bulletin board access and names and addresses are insufficient to permit a fair election, it should submit the case to the Division of Advice with a recommendation as to why additional remedies are warranted, including: granting a union access to nonwork areas during employees' nonwork time; giving a union notice of, and equal time and facilities for the union to respond to, any address made by the company regarding the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election. These remedies may be warranted where an employer makes multiple

---

<sup>32</sup> Blockbuster Pavilion, 331 NLRB at 1275.

<sup>33</sup> Id. at 1275 n.16, citing J.P. Stevens & Co. v. NLRB, 417 F.2d at 541. See also Excel Case Ready, 334 NLRB at 5.

<sup>34</sup> See Jewish Home for the Elderly of Fairfield County, 343 NLRB at 1069.

unlawful captive audience speeches or where the employer is a recidivist and has shown a proclivity to violate the Act.<sup>35</sup>

In order to secure a notice reading or any access remedies in Section 10(j) and unfair labor practice proceedings, Regions need to articulate why they are necessary. Regions should be prepared to argue that these remedies are needed both because of the impact on employee free choice inherent from the unfair labor practices themselves and, where available, the evidence that demonstrates that impact in a particular case. Thus, although the impact of these unfair labor practices on employee free choice may be inferred from the nature of the violations, Regions should also investigate for evidence to establish actual impact. The evidence that is currently collected during a 10(j) "just and proper" investigation will typically demonstrate the effects of an employer's unfair labor practices on employee free choice. Such evidence will also, therefore, bolster the need for these remedies by providing concrete evidence of impact upon employees.

---

<sup>35</sup>For cases where these remedies were concurrently granted, see, e.g., Avondale Industries, 329 NLRB at 1068 (nonwork access, equal time, and a 30 minute pre-election speech ordered where employer committed 141 unfair labor practices including over 30 discriminatory discharges); Fieldcrest Cannon, Inc., 318 NLRB at 473, 490-491 (nonwork access, equal time, and a 30 minute pre-election speech appropriate because managers gave numerous unlawful captive audience speeches); Texas Super Foods, 303 NLRB 209, 209 (1991) (nonwork access, equal time, and a 30 minute pre-election speech ordered to "provide the proper atmosphere for holding a fourth election" after the employer "blatantly disregarded" the Board's finding that it violated the Act); Monfort of Colorado, 298 NLRB 73, 86 (1990), *enfd. in rel. part*, 965 F.2d 1538, 1548 (10th Cir. 1992), citing Monfort of Colorado, 284 NLRB 1429, 1429-1430, 1479 (1987), *enfd. sub. nom. Food & Commercial Workers v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988) (nonwork access, equal time, and a 30 minute pre-election speech appropriate because the large number of incidents that occurred, the many supervisors involved, the personal involvement of the employer president, and the premeditated nature of the employer's violations demonstrated its proclivity to violate the Act); S.E. Nichols, Inc., 284 NLRB 556, 559-560 (1987), *enfd. in rel. part*, 862 F.2d 952, 960-963 (2d Cir. 1998), *cert. denied*, 490 U.S. 1108 (1989) (nonwork access, equal time, and a 30 minute pre-election speech necessary where employer was a recidivist who "continued to engage in an obdurate flouting of the Act"). For cases where only one of the remedies was granted, see, e.g., United States Service Industries, 319 NLRB at 231 (union access to nonwork areas during employees' nonwork time necessary because it was the third Board case documenting the employer's unlawful response to its employees' organizing efforts); Pennant Foods Co., 352 NLRB 451, 472-473 (2008) (equal time remedy necessary for third rerun election because the employer violated formal settlement).

In addition to articulating how the impact of the violations supports the need for these remedies, Regions should also articulate, based on the discussion above, how those remedies will remove the effects of the unlawful conduct and restore an atmosphere free of coercion where employees can exercise a free and informed choice.

In summary, I believe that these remedies will further the important goal of ensuring employee freedom of choice with regard to unionization and restore the status quo where an employer has committed serious unfair labor practices in response to an organizing campaign. The Board and courts have recognized these remedies as important tools for restoring the right of employees to make a free and informed choice regarding unionization, and I am committed to seek them in fulfillment of my obligation to protect those rights under the Act.



L.S.



## **Interim Report on the §10(j) Initiative regarding Organizing Campaign Discharges**

The initiative, outlined in GC Memo 10-07 (September 30, 2010), was launched to ensure that the Board obtains timely, meaningful remedies in so-called “nip-in-the-bud” cases – when, during a union organizing campaign at a workplace, employees are unlawfully discharged or subjected to other serious unfair labor practices designed to nip the protected activity in the bud before it bears fruit. The Memorandum sets out best practices for processing all the stages of such unfair labor practice cases so as to assure that the Agency promptly decides whether charges have merit and, in cases of unlawful discharge, the discharge is promptly remedied through settlement or §10(j) district court litigation in an attempt to quickly return the employee to work and negate the detrimental impact that the employer’s conduct had on employees at that facility.

Of the 157 nip-in-the-bud charges filed since the program began on October 1, 79 charges were resolved by January 31, i.e. 57 were found to be non-meritorious and 22 were found to have merit. Of those charges having merit, 12 were fully resolved by January 31. The average case processing time from filing to resolution was 61 days.

Since the initiative began, Regional Offices have submitted recommendations concerning whether to seek § 10(j) injunctive relief in 28 nip-in-the-bud cases, including 3 cases where the charge was filed after the initiative began. Of these 3 cases, one settled before ILB’s decision, one settled after Board authorization and one was not considered to warrant seeking § 10(j) interim relief. The Agency has obtained settlements in 22 nip-in-the-bud cases, including cases where the charge was filed before October 1, 2010 and a Region had submitted the matter to the Injunction Litigation Branch for §10(j) authorization. As a result of these settlements, 42 discharged employees were offered reinstatement, of whom 19 accepted the offers and 23 waived reinstatement; and, in total, they received \$354,978 in backpay.

In addition, a district court ordered interim reinstatement of an additional two discriminatees.

The tables below display case processing data for the first four months of the initiative October 1, 2010- January 1, 2011:

- (A) Regional processing of nip in the bud charges filed in the first four months of the initiative
- (B) Injunction Litigation Branch processing of all nip in the bud §10(j) recommendations from Regional Offices (*this table includes cases based on charges filed with Regional Offices before October 1, in which the investigation was completed and the case submitted to the ILB on or after October 1*)



**A. Regional Processing of Nip-in-the-Bud Charges**  
**Filed 10/1/10-1/31/11**

|                                          |                                          |       |    |    |   |
|------------------------------------------|------------------------------------------|-------|----|----|---|
| <b># charges filed - all allegations</b> |                                          | 7,348 |    |    |   |
| <b>"nip-in-the-bud" charges filed</b>    |                                          | 157   |    |    |   |
|                                          |                                          |       |    |    |   |
| <b>Merit determination</b>               | Pending                                  |       | 78 |    |   |
|                                          | No merit                                 |       | 57 |    |   |
|                                          | Merit                                    |       | 22 |    |   |
|                                          |                                          |       |    |    |   |
| <b>Resolution of merit cases</b>         |                                          |       |    |    |   |
|                                          | settlement pre-complaint                 |       |    | 10 |   |
|                                          | complaint issued                         |       |    | 12 |   |
|                                          |                                          |       |    |    |   |
| <b>Regional §10(j) Consideration</b>     |                                          |       |    |    |   |
|                                          | §10(j) consideration pending             |       |    |    | 4 |
|                                          | Expedited administrative hearing         |       |    |    | 5 |
|                                          | Submitted to ILB                         |       |    |    | 3 |
| <b>ILB/GC §10(j) consideration</b>       | Submissions pending in ILB               |       |    |    | 0 |
|                                          | Settled before ILB decision              |       |    |    | 1 |
|                                          | No §10(j) at this time                   |       |    |    | 1 |
|                                          | Board authorization sought               |       |    |    | 1 |
| <b>Board authorization</b>               | GC requests authorized                   |       |    |    | 1 |
| <b>Litigation</b>                        | Settled post-authorization, pre-petition |       |    |    | 1 |

**B. ILB Processing of Nip-in-the-Bud §10(j) Recommendations  
Submitted to ILB 10/1/10-1/31/11; Charges Filed Any Time before 1/31/11**

|                             |                                          |                                     |    |    |    |   |   |
|-----------------------------|------------------------------------------|-------------------------------------|----|----|----|---|---|
| <b># cases submitted</b>    |                                          |                                     | 28 |    |    |   |   |
| <b>ILB/GC determination</b> |                                          |                                     |    |    |    |   |   |
|                             | Submissions pending in ILB               |                                     |    | 2  |    |   |   |
|                             | Settled before ILB decision              |                                     |    | 5  |    |   |   |
|                             | No §10(j) at this time                   |                                     |    | 9  |    |   |   |
|                             | Board Authorization sought               |                                     |    | 12 |    |   |   |
| <b>Board Authorization</b>  |                                          |                                     |    |    |    |   |   |
|                             | Requests pending                         |                                     |    |    | 2  |   |   |
|                             | Requests authorized                      |                                     |    |    | 10 |   |   |
| <b>Litigation</b>           |                                          |                                     |    |    |    |   |   |
|                             | petition not yet filed                   |                                     |    |    |    | 1 |   |
|                             | settled post-authorization, pre-petition |                                     |    |    |    | 5 |   |
|                             | petitions filed                          |                                     |    |    |    | 4 |   |
|                             |                                          |                                     |    |    |    |   |   |
|                             |                                          | settled post-petition, pre-decision |    |    |    |   | 2 |
|                             |                                          | injunction granted                  |    |    |    |   | 1 |
|                             |                                          | petitions pending                   |    |    |    |   | 1 |

**OFFICE OF THE GENERAL COUNSEL**

**MEMORANDUM GC 11- 04**

January 12, 2011

**TO:** All Regional Directors, Officers-in-Charge,  
and Resident Officers

**FROM:** Lafe E. Solomon, Acting General Counsel

**SUBJECT:** Revised Casehandling Instructions Regarding the Use of Default  
Language in Informal Settlement Agreements and Compliance Settlement  
Agreements

The 2002 Best Practices Compliance Case Report, as set forth in GC Memorandum 02-04, recommended that Regions include default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. In OM 05-96, "Casehandling Instructions Regarding Use Of Default Language in Settlement Agreements," dated September 16, 2005, revised default language was set forth to address some concerns raised by then Chairman Battista in *Great Northwest Builders, LLC*, 344 NLRB 969 (2005).

Our experience is that the Board routinely has enforced these provisions when ruling on motions for summary judgment filed by counsel for the General Counsel when there has been a breach of the settlement agreement. Operations-Management recently surveyed all Regions about their use of default provisions in settlement agreements. This survey showed that five Regions routinely propose, and three of those Regions regularly insist upon, inclusion of default language in all informal settlement agreements. With a settlement goal of 95%, these five Regions achieved settlement rates in FY 2009 of 96.9, 98.3, 95.6, 96.5 and 93 percent, respectively, and in FY 2010 of 100, 96.2, 94.2, 91.6 and 95.1 percent, respectively. These Regions also achieved litigation "win rates" in FY 2009 of 100, 75, 83.3, 90 and 93.3 percent, respectively, compared to a national rate in FY 2009 of 89.9 percent, and achieved litigation "win rates" in FY 2010 of 100, 100, 87.0, 87.5 and 100 percent, respectively, compared to the national rate in FY 2010 of 91.4 percent. These statistics demonstrate that the Regions' policy on including default language in settlement agreements does not adversely impact on either their settlement rates or the success they enjoy in litigating cases they cannot settle.

Based on this experience and the input from our Regional Directors, I have decided to expand the use of default language. There is a potential for considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a summary proceeding in the event of a breach.

Accordingly, Regions are hereby instructed to routinely include default language in all informal settlement agreements and all compliance settlement agreements.<sup>1</sup>

Regional Office experience under outstanding GC guidelines demonstrates that default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative provisions of the settlement agreement. Since the default language simply requires a charged party/respondent to honor the commitments it made in the settlement agreement, it is a reasonable requirement that ensures that the Agency will not be required to litigate a settled issue. In many cases, the default language will have been agreed to by a charged party/respondent only after the Regional Office has expended government resources to prepare for an administrative hearing. Failure to abide by the terms of a settlement that does not contain default language would require that the government incur the expense of preparing again for the administrative hearing and delays the provision of remedial relief. Therefore, to avoid duplicative expenses and delay, it is especially appropriate to include summary default language in informal settlement agreements.

With respect to compliance settlements, such agreements are usually concluded only after the entry of a Board Order or Court judgment.<sup>2</sup> At that stage of the proceeding, the arguments are even more compelling for default language in the settlement to avoid any further delays in the provision of remedial relief.

Therefore, language such as that set forth below should be included in all settlement agreements to meet these concerns:

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether

---

<sup>1</sup> Regions should alternatively consider utilizing "confessions of judgment" in cases involving backpay installment plans. See OM 09-58, "Confessions of Judgment," dated April 10, 2009. In addition, Regions are reminded that in any settlement providing for installment payments, absent extraordinary circumstances, the Region should obtain some type of security from the respondent. See Casehandling Manual (Part III) – Compliance Proceedings, Section 10592.12.

<sup>2</sup> Regions are reminded of the outstanding directions regarding the consolidation, in appropriate circumstances, of compliance matters with the initial complaint. See, e.g., Casehandling Manual (Part III) – Compliance Proceedings, Sections 10506.2(c), 10508.3 and 10646.3.

the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

While in most cases the complaint will have already issued, in situations where the complaint has not issued, the default language should provide that the Regional Director will issue complaint on all allegations of the charge(s) in the instant case(s) that were found to have merit and list all the allegations and any specific remedial relief sought and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

If the compliance specification has not issued in a compliance case, the default language should provide that the Regional Director will issue a compliance specification and list all liquidated backpay or other remedial provisions and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

#### Filing Motions for Default Judgment

When filing a motion seeking a default judgment with the Board, it is critically important that the Region should explicitly detail in its motion for default judgment the precise remedial relief that the Region wishes the Board to provide in its order. Similarly, in such a case, to obtain enforceable remedies, it is equally important to consider this issue when drafting the language of the settlement agreement and to detail any remedial acts or requirements that respondent is expected to undertake or with which it is expected to comply.

If a Region is seeking a default judgment based on a charged party/respondent committing an unfair labor practice in violation of the cease and desist provisions of the settlement, the Region should issue a complaint on the new unfair labor practice and seek to consolidate this hearing with its motion to the Board for a default judgment.<sup>3</sup> If the Region prevails in showing that a new ULP was committed and that this violation breached the terms of the prior settlement agreement, the Region would seek to have the Board issue a default judgment on the prior settlement as well as remedying the new unfair labor practice.

---

<sup>3</sup> When consolidating the Motion for Default Judgment with the hearing on the new unfair labor practice, the Region should not ask the Judge to rule on this Motion. Rather, the Region should request that the Judge refer the Motion for Default Judgment to the Board when the Judge issues a decision on the new alleged unfair labor practice.

Revisions to the ULP and Compliance Casehandling Manuals will be prepared to reflect the contents of this memorandum. If you have any questions regarding this memorandum, please contact your Assistant General Counsel.



L.S.

cc: NLRBU  
NLRBPA  
Release to the Public

MEMORANDUM GC 11- 04





United States Government  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, DC 20570  
[www.nlr.gov](http://www.nlr.gov)

February 14, 2011

The Honorable Darrell E. Issa  
Chairman, Committee on Oversight  
and Government Reform  
House of Representatives  
2157 Rayburn House Office Building  
Washington, DC 20515-6143

Re: NLRB Compliance with FOIA

Dear Mr. Chairman:

This is in response to your letter dated, January 25, 2011, addressed to me, in which you asked several questions concerning the National Labor Relations Board's compliance with the Freedom of Information Act (FOIA).

In response to your letter, I am attaching a CD that contains, in Microsoft Excel format, the following data that you requested for the past 5 years: (a) the name of the requester; (b) the date of the request; (c) a brief description of the documents or records sought by the request; (d) the tracking number (FOIA ID number) assigned to the request by the NLRB pursuant to Section 7 of the OPEN Government Act of 2007; (e) the date the request was closed (Response Sent); and (f) whether any records were provided in response to the request (i.e., Granted; Denied; Part Granted and Denied; Request Suspended; Withdrawn; or Referred).

Please note that the description of the documents or records sought may contain information that would be exempt from disclosure pursuant to FOIA Exemptions 6, 7(C), and/or 7(D). Such information (i.e., personal confidential information, names of affiants, etc.) would be redacted when responding to a FOIA request because its disclosure could constitute an unwarranted invasion of privacy or reveal the existence of a confidential source.

The NLRB does not have any FOIA requests that have been pending more than 45 days. And within the past 5 years, the NLRB has not been ordered by a court to pay any attorneys' fees or other litigation costs incurred by a FOIA requester under 5 U.S.C. § 552(a)(4) (E) or under any similar law or regulation.

The Honorable Darrell E. Issa  
Page Two

Please do not hesitate to contact me if you have any additional questions or desire any additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jacqueline A. Young".

Jacqueline A. Young  
Assistant General Counsel  
GC FOIA Officer  
[Jacqueline.Young@nrlrb.gov](mailto:Jacqueline.Young@nrlrb.gov)  
(202) 273-3825

Enclosure

ONE HUNDRED TWELFTH CONGRESS

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

Majority (202) 225-5074  
Minority (202) 225-5051

January 25, 2011

Jacqueline A. Young  
Assistant General Counsel  
National Labor Relations Board  
Room 10612  
1099 14th Street, N.W.  
Washington, D.C. 20570

Dear Ms. Young:

The Freedom of Information Act ("FOIA") is one of the most important tools for government transparency and accountability. In their mission to find waste, fraud, and abuse, the oversight and investigative committees of Congress, including the Committee on Oversight and Government Reform ("Committee"), are often assisted by tips, complaints, and briefings from media organizations, watchdog groups, and concerned citizens. These private-sector actors are often the first to become aware of federal inefficiency or malfeasance. FOIA allows them to scrutinize the activities of federal agencies. Without FOIA, they could not hold the government accountable, nor could they provide crucial assistance to Congressional oversight. President Obama recognized the importance of FOIA when he made it the subject of an executive memorandum on his second day in office.<sup>1</sup>

The Committee, as the principal oversight committee in the House of Representatives with broad oversight jurisdiction as set forth in House Rule X, is very interested in ensuring that all federal agencies respond in a timely, substantive, and non-discriminatory manner to requests for information under FOIA. To enable the Committee to understand the impact of recent changes to FOIA procedures and to evaluate agencies' compliance with FOIA, please provide the following information, records, and explanations by **February 15, 2011 at 5:00 pm.**

1. Provide your agency's FOIA log(s) for the five years preceding the date of this letter, in Microsoft Excel or a similar format that allows sorting by column or information category, including at least the following information: (a) the name of the requestor; (b) the date of the request; (c) a brief description of the documents or records sought by the request; (d) any tracking number assigned to the request by your agency pursuant to

<sup>1</sup> The White House, Memorandum for the Heads of Executive Departments and Agencies, Jan. 21, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/) ("[T]he Freedom of Information Act, which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government").

Jacqueline A. Young  
January 24, 2011  
Page 2

Section 7 of the OPEN Government Act of 2007<sup>2</sup>; (e) the date the request was closed, if it is not still outstanding; (f) whether any records were provided in response to the request; and (g) any additional identification number or code assigned to the request by your agency for internal use.

2. On each log provided in response to Request No. 1, identify each FOIA request to your agency that was submitted more than 45 days prior to the date of this letter and to which your agency has not yet issued a complete and final response.

3. For each FOIA request identified in response to Request No. 2, provide all communications between your agency and the requestor.

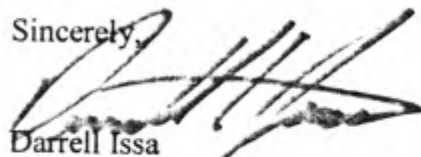
4. Identify any federal judicial action in which your agency, within the five years preceding the date of this letter, has been ordered by the court to pay any attorneys' fees or other litigation costs incurred by a FOIA requestor under 5 U.S.C. § 552(a)(4)(E) or under any similar law or regulation.

5. For each federal action identified in response to Request No. 4, provide a copy of the court order requiring your agency to pay attorney fees or other litigation costs.

Please note that for purposes of responding to this request, the terms "records," "communications," and "referring or relating" should be interpreted consistently with the attached Definitions of Terms.

Thank you for your prompt attention to this matter. If you have any questions regarding this request, please contact Hudson Hollister or Tegan Millspaw with the Committee staff at (202) 225-5074.

Sincerely,



Darrell Issa  
Chairman

cc: Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government Reform

David Ferriero, Archivist of the United States

Miriam Nisbet, Director, National Archives, Office of Government Information Services

Attachment

---

<sup>2</sup> Pub. L. No. 110-175.

## Definition of Terms

1. The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A record bearing any notation not a part of the original text is to be considered a separate record. A draft or non-identical copy is a separate record within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.